21052

(17,790.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 305.

CHARLES W. LYNDE, PLAINTIFF IN ERROR,

vs.

MARY W. LYNDE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Caption in court of appeals	*a*	1
Case on appeal	*a*	1
Statement under rule 41	1	1
Summons	2	1
Complaint	3	2
Exhibit "A"—Case on appeal in New Jersey	16	9
Petition	16	9
Decree	18	10
Amended final decree	20	11
Affidavit of Mary W. Lynde	23	13
Mary W. Lynde	27	14
James Westervelt	29	15
Order to show cause	32	17
Memorandum of the chancellor on petition to amend decree	33	18
Testimony of Mary W. Lynde	35	18
Testimony of James S. Aitken	38	20
Notice to take testimony	45	24
Testimony of Chauncy H. Beasly	46	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 7, 1900.

	Original	Print
Exhibit "A"—		
Exhibit D[1]—Letter, Lynde to Beasly, March 1, 1893	48	26
D[2]—Letter, Lynde to Beasly, March 3, 1893	49	27
D[3]—Letter, Lynde to Beasly, June 28, 1893	50	27
D[4]—Letter, Beasly to Lynde, June 29, 1893	52	28
D[5]—Letter, Lynde to Beasly, March 17, 1893	53	29
Notice to take testimony	55	30
Testimony of Rollin H. Lynde	56	30
Opinion of the chancellor	62	33
Order amending decree	69	37
Notice of appeal	70	38
Petition of appeal	71	38
Endorsement on case on appeal	73	39
Exhibit "B"—Stipulation to adjourn argument	74	39
"C"—Stipulation to adjourn argument	75	40
"D"—Affidavit of Charles W. Lynde	76	40
"D"—Affidavit of Rollin H. Lynde	78	41
"E"—Memorandum of the chancellor	81	43
"F"—Notice to take testimony	82	43
"G"—Notice to take testimony	83	44
"H"—Notice of argument	84	44
"K"—Judgment of court of errors and appeals, July 1, 1897	85	45
"L"—Notice of motion for reference	86	45
"M"—Order of reference	87	46
"N"—Master's report	90	47
"O"—Order on master's report	93	49
"P"—Final decree	94	50
"Q"—Notice of motion for writ of sequestration, &c.	100	53
"R"—Order appointing receiver, &c.	103	54
Answer	107	56
Decision	110	58
Judgment	119	63
Defendant's exceptions to findings	124	66
Notice of appeal	130	69
Opinion	131	70
Evidence	134	71
Testimony of George H. Bruce	136	72
J. Herbert Potts	141	76
Charles W. Lynde	151	83
Plaintiff's Exhibit 1—Record from chancery court of New Jersey	152	83
Order for publication, Dec. 24, 1892	152	83
Order of reference, March 14, 1893	153	84
Master's report, May 17, 1893	154	84
Rule for hearing, May 17, 1893	155	85
Order substituting solicitor, January 30, 1886	156	85

	Original.	Print
Plaintiff's Exhibit I—Order that cause stand over, May 5, 1896	156	86
Order denying motion, July 13, 1897	157	86
Order that commission issue, September 27, 1897	158	87
Order extending time, Dec. 4, 1897	159	87
Order that cause stand over, &c	160	88
Affidavit of James Westervelt	161	88
Letter, Westervelt to Lynde, January 14, 1898	162	89
Affidavit of James Westervelt	164	90
Order for injunction	166	91
Notice of receiver	167	91
Writ of injunction, &c	168	92
Plaintiff's Exhibit II—(Already printed; not set out here)	173	95
III—Letter of J. Herbert Potts to James Westervelt, July 8, 1897	174	95
IV—Copy of sections of divorce law of New Jersey	174	96
Copy of rule 20, court of chancery	176	97
Defendant's Exhibit No. 1—Letter of Charles W. Lynde to J. Herbert Potts, March 22, 1897	177	97
No. 2—Order of the chancellor, September 7, 1897	178	98
Affidavit of Jas. Westervelt	179	98
Stipulation as to record on appeal	182	100
Opinion of appellate division	183	100
Order of appellate division	195	107
Certificate of clerk of appellate division	196	108
Judgment of affirmance	197	108
Defendant's notice of appeal	198	109
Plaintiff's notice of appeal	199	109
Stipulation waiving certification of record	200	110
Remittitur of court of appeals	201	110
Opinion of court of appeals by Gray, J	204	111
Concurring opinion of Landon, J	213	120
Order for judgment on remittitur	214	121
Judgment on remittitur	216	121
Writ of error	219	122
Acceptance of service of papers by counsel for defendant in error	222	123
Citation	223	124
Bond on writ of error	225	124
Clerk's certificate	228	126
Order allowing writ of error to Mary W. Lynde	229	127
Petition of Mary W. Lynde for writ of error	230	127
Assignment of errors by Mary W. Lynde	231	128
Writ of error sued out by Mary W. Lynde	235	129
Citation to Charles W. Lynde	237	130
Bond on writ of error sued out by Mary W. Lynde	238	130
Admission of service of writ of error papers	241	132
Clerk's certificate and return to writ of error sued out by Mary W. Lynde	242	133

a Court of Appeals of the State of New York.

MARY W. LYNDE, Respondent and Appellant,
against
CHARLES W. LYNDE, Appellant and Respondent.

Case on Appeal.

James Westervelt, attorney for Mary W. Lynde, 52 Wall street, New York city, B. M.
George S. Ingraham, attorney for Charles W. Lynde, 166 Montague street, Brooklyn, N. Y.

1 Supreme Court, Suffolk County.

MARY W. LYNDE, Respondent,
vs.
CHARLES W. LYNDE, Appellant.

Statement under Rule 41.

This action was commenced on the 26th day of May, 1898, by the service of the summons and complaint herein on the defendant, Charles W. Lynde.
The answer was served on July 1, 1898.
There has been no change of parties or attorneys since the action was begun.
This case contains all the evidence taken at the trial.

2 *Summons.*

N. Y. Supreme Court, County of New York.

MARY W. LYNDE, Plaintiff,
against
CHARLES W. LYNDE, Defendant.
Trial Desired in New York County. Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.
Dated May 5th, 1898.

JAMES WESTERVELT,
Plaintiff's Attorney.

Post-office address and office, No. 52 Wall street, borough of Manhattan, New York city.

3 *Complaint.*

Supreme Court, New York County.

MARY W. LYNDE, Plaintiff,
vs.
CHARLES W. LYNDE, Defendant.

The plaintiff above named, by James Westervelt, her attorney, complains of the defendant and alleges as follows:

First. That the plaintiff, whose maiden name was Mary G. Wright, was lawfully married to the defendant on the 25th day of March, 1884, at the city of Trenton, in the State of New Jersey, by the Rev. S. M. Studdiford; and that thereafter plaintiff and defendant remained inhabitants of the State of New Jersey, living together as husband and wife, in Trenton aforesaid, for almost four years, and until the defendant deserted the plaintiff and left the State of New Jersey, at the time and in the manner hereinafter stated.

Second. That during the period mentioned in the first paragraph of this complaint, and for a long time before his desertion of plaintiff, the said defendant became habitually intemperate, and treated this plaintiff in a cruel and inhuman manner, and repeatedly beat and bruised her, and wholly neglected to provide her with necessary food and clothing.

Third. That on or about the 21st day of December, 1887,
4 the defendant deserted the plaintiff, and left the said State of New Jersey, and never thereafter returned to her, and has never since provided or made any attempt to provide for her in any manner or degree. And that thereafter, for more than two years, the said defendant wilfully, continually and obstinately deserted the plaintiff, and during all that time wholly neglected to make any provision for her support.

Fourth. That plaintiff had not then, and has not at any time since had, and has not now, any means of support other than her own exertions.

Fifth. That after her abandonment and desertion by the defendant, as hereinbefore stated, the plaintiff, while still a resident of the State of New Jersey, commenced a suit in the court of chancery of New Jersey, and filed a petition in said court for an absolute divorce and for alimony, on the 18th day of November, 1892, a copy of which is set forth on pages *1, *2 and *3 of the case on appeal hereinafter described, which is hereto annexed and marked Exhibit "A."

Sixth. That process was thereupon duly issued out of the said court, directed to the defendant in due form of law, requiring the defendant to appear and answer said petition, and that said process was issued and returned according to law and the rules of said court. That, as the defendant could not be found within the State of New Jersey, an order for the publication of the said process and for the service thereof by publication and mailing was duly made by the

said court according to the laws of the said State and the rules and practice of said court, and that notice thereof was duly published and mailed according to the said laws and rules and practice.

Seventh. That by the laws of the State of New Jersey and the rules and practice of the said court the said court had full
5 power and jurisdiction thereupon, and upon showing the proper facts to its satisfaction, to grant and make a decree of divorce in said cause, and therein and thereby to reserve the question of alimony for decision upon a future application therefor; and that such is the usual course and practice of said court in such cases.

Eighth. That the defendant having made default in answering the said petition, an order was thereupon and on the 14th day of March, 1893, duly made, referring said cause to a special master to take the necessary proofs therein.

That thereupon the special master named in said order proceeded to take proof of the facts alleged in the petition and did take proof thereof, and on or about May 17th, 1893, filed his report.

Ninth. That thereafter and on or about the 7th day of August, 1893, a decree was duly made, entered and enrolled in said suit by said court of chancery, a copy of which is set forth on pages No. *3 and No. *4 of Ex. "A," hereto annexed. And plaintiff alleges that the said court had jurisdiction of the subject-matter of said suit and of the parties hereto, and had power to make said decree as stated in the seventh paragraph hereof, and that all proceedings in said suit were regular and in due form of law according to the practice of the said court, except for the inadvertent omission in said decree which is hereinafter set forth, and that said decree has ever since remained and still remains in full force unrevoked, unreversed and unaltered except as hereinafter set forth.

Tenth. That, although the aforesaid petition specifically asked for alimony, and this plaintiff, the petitioner therein, repeatedly instructed her then solicitor to take the necessary measures to secure her right to alimony, yet through the inadvertence of her
6 said solicitor, and without the knowledge of this plaintiff, the aforesaid decree was entered, making no provision touching alimony, or reserving the consideration and allowance thereof for hearing upon a future application to be made on her behalf, all of which more fully appears by the petition and affidavits thereafter filed in said suit, which are set forth on pages *5–16 of the annexed Ex. "A" and hereinafter more fully described.

Eleventh. That thereafter and during the year 1894, the defendant's father died, leaving a vast estate, and that his will was probated and recorded in the surrogate's office of Kings county, N. Y., on or about September 24th, 1894. That under said will the defendant, as one of two residuary legatees, inherited from his said father, as his share of his said estate, over five hundred thousand dollars ($500,000), and that defendant has been for about two years past, and now is, in possession of his said share of said estate.

Twelfth. That thereafter and on or about the 11th day of February, 1896, and immediately after learning the facts set forth in the

tenth and eleventh paragraphs of this complaint, plaintiff duly filed a petition and affidavits in said court of chancery in the aforesaid cause, setting forth the premises and praying the said court, among other things, to open the aforesaid decree of August seventh, 1893, and amend the same by decreeing that reasonable alimony should be paid by defendant to this plaintiff, the petitioner therein, and for other relief, as more fully appears by said petition and affidavits, copies whereof are set forth on pages *5–16 of the aforesaid case on appeal, the said annexed Ex. "A."

Thirteenth. That thereafter, and on the 14th day of February, 1896, an order, a copy of which is set forth on pages 17 and
7 18 of said Ex. "A," hereto annexed, was duly made in said cause by the court of chancery aforesaid directing the defendant to appear and show cause, among other things, why the prayer of said petition should not be granted, and prescribing the method of service thereof upon the said defendant.

Fourteenth. That certified copies of the last above mentioned petition, affidavits and order to show cause were duly personally served upon said defendant in accordance with said order, and the rules and practice of the court aforesaid.

Fifteenth. That thereafter, on the 24th day of February, 1896, the defendant duly appeared in said action by Mr. J. Herbert Potts, his attorney and solicitor, thereunto by him duly authorized, and then and thereafter strenuously opposed the said application of the petitioner. Said appearance was a general appearance, and said opposition was based on the alleged falsity of the facts set forth in the last above mentioned petition. No pretence was then, or has ever since been, made that there was a mere appearance for any special purpose only, but defendant subjected himself fully and unreservedly to the jurisdiction of the said court for the purpose of litigating the said case upon its merits, as appears by Exhibits "B," "C," "D," "E," "F" and "G," which are hereto annexed and hereinafter more fully described.

That the defendant through his said solicitor, Mr. J. Herbert Potts, then asked for an adjournment of the argument of petitioner's motion on the sole ground that he had not had time to prepare to oppose the same, and that neither then nor at any time thereafter was any suggestion or pretence made that the appearance on behalf of defendant was other than general. That the defendant's solicitor thereafter entered into, and signed, as solicitor of defendant,
8 two stipulations in said cause adjourning said argument, which are hereto annexed and marked Exhibits "B" and "C." On April 6th, 1896, defendant filed in said cause affidavits in opposition to said application on behalf of petitioner, copies of which are hereto annexed, marked Exhibit "D," and at the same time, through his said solicitor, Mr. Potts, and his counsel, Mr. C. H. Voorhis, opposed said application, and thereafter, from time to time, continued said opposition.

After hearing the arguments of solicitors and counsel for both parties, the chancellor handed down a decision or memorandum, a copy of which is hereto annexed and marked Exhibit "E."

That by consent of both parties no order was entered thereon, but testimony was taken pursuant thereto on behalf of both parties, a copy of which and the proceedings relating thereto is set forth on pages *19 to *46 of Ex. "A," hereto annexed. That the notices, copies of which are set forth on pages *30 and *40 of said Ex. "A," were signed and endorsed by said Potts as solicitor of defendant in said cause, and served on the solicitor's petitioner therein, Mr. Westervelt, copies whereof, showing the endorsements, are hereto annexed and marked Exhibits "F" and "G."

Thereafter, on May 25, 1896, the evidence and proofs taken on behalf of both parties in said suit were submitted to the chancellor of New Jersey, and the motion to amend the decree aforesaid was fully reargued on behalf of both parties therein.

Sixteenth. That thereafter, and on or about October 27, 1896, an order, a copy of which is set forth on pp. *53 and *55 of Ex. A, hereto annexed, was duly made and filed in said cause, amending the aforesaid decree therein of Aug. 7, 1893, by adding thereto a clause giving to the petitioner, the plaintiff herein, the right to apply to said court at any time thereafter at the foot of said
9 decree for reasonable alimony, and reserving to the said court the power to dispose of said application when it should arise. All of which more fully appears by said copy of said order on pp. *53 and *55 of said Ex. "A" hereto annexed.

Seventeenth. That said defendant on the 6th day of November, 1896, appealed from the whole and every part of the order last above mentioned to the New Jersey court of errors and appeals in the last resort in all causes, and duly filed a notice of appeal, a copy of which is set forth on pp. *55 and *56 of said Ex. A and served same on petitioner's solicitor, and thereafter filed his petition of appeal in said court of errors and made a deposit of $100 as security for costs on appeal as required by the laws of said State and the rules and practice of said court, and duly filed his printed case on appeal, all of which more fully appears by a copy of said case on appeal, hereto annexed and marked Exhibit "A."

And defendant through his duly authorized solicitor aforesaid served notice of argument of said appeal, a copy whereof is hereto annexed, marked Ex. "H," and brought the said appeal on for hearing before the said court of errors and appeals at the March term, 1897.

And the said court having duly considered the questions brought up by said appeal, thereafter, and on the 28th day of June, 1897, duly made an order in all things affirming the order of the court of chancery appealed from with costs and remitting the record to the said court of chancery, as more fully appears by the remittitur, a copy whereof is hereto annexed, marked Exhibit "K."

Eighteenth. Plaintiff further alleges that on October 27th, 1896, immediately after the making of the order mentioned in the sixteenth paragraph of this complaint, due notice of a motion
10 for a reference to ascertain and report whether alimony should be allowed to said petitioner, this plaintiff, and if so, how much, was duly served on said solicitor of said defendant.

Said notice of motion, a copy of which is hereto annexed, marked Exhibit "L," was returnable on the 2d day of November, 1896, and on said day the argument of said motion was adjourned one week at the request of defendant's said solicitor.

Thereafter and between the date of service of said notice and the argument of said motion, the defendant appealed from the last above mentioned order of the court of chancery as set forth in the 17th paragraph of this complaint, and thereafter said motion was fully argued on behalf of both parties, and decision thereon was reserved until after the disposition of the aforesaid appeal by the said court of errors and appeals.

That thereafter and after the aforesaid decision and order of the said court of errors and appeals, due notice of a renewal of said application for a reference was duly served upon the solicitor of said defendant, and thereupon an order was duly made and entered in the aforesaid cause in said court of chancery, a copy of which order is hereto annexed and marked Exhibit "M."

That thereupon the special master named in said order issued a summons to defendant to appear before him, which was duly served on defendant's solicitor, and said special master then proceeded in due course to take proof of the facts thereby referred to him, and alleged in the petition of petitioner therein, this plaintiff, which petition is described in the 12th paragraph of this complaint, and the said special master did take proof thereof, and on or about the 15th day of December, 1897, filed his report, a copy of which is hereto annexed, marked Exhibit "N," and a rule *nisi* to confirm
the same was on said December 15th, 1897, duly entered in
11 said cause and duly served on defendant according to the
rules and practice of said court of chancery. A copy of said rule is hereto annexed and marked Exhibit "O."

Nineteenth. That thereafter and on or about the 28th day of December, 1897, a final decree was duly made and entered in said suit by the said court of chancery, a copy of which is hereto annexed and marked Exhibit "P;" and said decree was thereafter duly enrolled; and the plaintiff alleges that the said court of chancery had jurisdiction of the person of the said defendant, and of the said subject-matter of said suit, and that all proceedings therein were regular and in due form of law, according to the practice of the said court, and that said decree has ever since remained and still remains in full force, unreversed, unrevoked and unaltered, and that no part of the sum therein and thereby directed to be paid by defendant to plaintiff has been paid, but the same and every part thereof is now due and owing to plaintiff herein.

Twentieth. And plaintiff further alleges that according to the laws of the State of New Jersey, and the rules and practice of the courts thereof, the said decree is valid and effectual in said State as a personal judgment against the said defendant to bind his property within said State by process of execution or otherwise, and to compel the said defendant to comply with the several other provisions thereof.

Twenty-first. Plaintiff further alleges on information and belief

that the defendant has since the making of the decree of divorce mentioned in the ninth paragraph of this complaint, and since the filing of the petition mentioned in the 12th paragraph of this complaint, and acting upon the theory of the validity and binding force of said decree, and of the jurisdiction of the said court of
12 chancery to make the same, some time in the month of March, 1896, married a woman whose name is unknown to this plaintiff, with whom he is now living as his wife at Blue Point, in in the county of Suffolk and State of New York, and defendant claims to have been justified in contracting and entering into said married relation by virtue of the decree aforesaid.

Twenty-second. Plaintiff further alleges that on the 18th day of January, 1898, a certified copy of the aforesaid decree of December 28th, 1897, Ex. "P," hereto annexed, together with the taxed bill of costs of the petitioner therein and a written demand for compliance by said defendant with the terms of the aforesaid decree were duly personally served upon the said defendant, and the said defendant then refused to comply therewith, and has since wholly refused to comply with the terms of said decree in any respect, and has wholly failed to pay the amount of alimony directed and adjudged to be paid by the said decree or the costs of the said suit, which were duly taxed and adjusted and amounted to the sum of $136.07, or the counsel fee of $1,000 or any part thereof, and that there is now due and unpaid and owing by the defendant to the plaintiff, according to the terms of the said decree, alimony at the rate of $80 per week from the 11th day of February, 1896, to the 28th day of December, 1897, amounting to the sum of $7,840, with interest thereon from the 28th day of December, 1897, and the said costs and counsel fee amounting in all to the sum of $8,976.07, with interest from said 28th day of December, 1897, and also the sum of $80 per week from the 28th day of December, 1897, payable at the expiration of each and every week thereafter up to the present time, with interest on each of said weekly payments from the days when they severally fell due.

13 Twenty-third. That no execution was issued out of the said court of chancery to enforce the payment of the said several sums, because so far as plaintiff was able to ascertain, with due diligence, or has any information sufficient to form a belief, the said defendant had not and has not any property in the said State of New Jersey subject to execution.

Twenty-fourth. That on said 18th day of January, 1898, there was duly personally served upon the said defendant a notice of motion to be made in the said suit in the said court of chancery for the appointment of a receiver of his property, and for other relief, a copy of which notice, with proof of service thereof, is hereto annexed and marked Exhibit "Q," and that the said notice was thereafter duly posted in the clerk's office of the court of chancery in the city of Trenton and State of New Jersey, according to the laws of the State of New Jersey and the rules and practice of the said court.

That thereafter, on the 24th day of March, 1898, pursuant to the said notice, an order was duly made, entered and filed in said cause,

a copy of which is hereto annexed, marked Exhibit "R," appointing a receiver of the property of the said defendant Charles W. Lynde, and directing that an injunction issue against him, as therein more fully appears.

Twenty-fifth. That it has been and will be practically impossible for the said receiver to obtain possession of any property or assets of said defendant in the State of New Jersey.

Twenty-sixth. That each and every one of the papers hereinabove mentioned and described, copies of which are hereto annexed, are hereby referred to and made a part of this complaint, as if herein set forth in full.

14 Wherefore plaintiff demands judgment against the defendant as follows:

1. That the aforesaid decree and order of the court of chancery of New Jersey of December 28th, 1897, and March 24th, 1898, respectively, may be enforced against the defendant with like force and effect as if the same were a judgment of this court, and that plaintiff may have all the rights and remedies for the enforcement thereof provided by the laws of the State of New York and the Constitution of the United States, and the rules and practice of this court in such cases.

2. That plaintiff may have judgment for the sum of $8,976.07 alimony, counsel fee and costs due under the said decree of the 28th day of December, 1897, together with interest thereon from that date, besides the costs and disbursements of this action.

3. That permanent alimony may be awarded and adjudged to be paid to the plaintiff by the defendant from the 28th day of December, 1897, continuously, at the rate of $80 a week in accordance with the terms of the aforesaid decree of December 28th, 1897, together with interest upon each weekly payment from the time the same became due and that defendant be required to give security for the payment thereof and for the payment of the aforesaid sum of $8,976.07.

4. That a receiver be appointed herein of the real and personal property of the defendant ancillary to the receiver appointed by the court of chancery, that defendant's property be sequestrated, and that defendant be enjoined during the pendency of this suit, and thereafter, so far as necessary, from assigning, transferring or otherwise disposing of any of his real or personal property except subject to the order of this court.

15 5. That plaintiff have such further or other order, judgment or relief as to the court shall seem equitable and just.

JAMES WESTERVELT,
Attorney for Plaintiff.

Office and P. O. address, 52 Wall street, New York.

STATE OF NEW YORK, } ss:
County of New York, }

Mary W. Lynde, being duly sworn, deposes and says that she is the plaintiff above named; that she has read the foregoing com-

plaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true.

MARY W. LYNDE.

Sworn to before me this 5th day of May, 1898.

JOHN OSCAR BALL,
Notary Public, N. Y. Co.

16 EXHIBIT "A."

Case on appeal in New Jersey. For endorsement, &c., see page 73, *infra*.

*1 *Petition.*

In Chancery of New Jersey.

To the Hon. A. T. McGill, chancellor of New Jersey:

The petition of Mary W. Lynde, of the city of Trenton and the State of New Jersey, respectively shows that your petitioner was married on the twenty-fifth day of March, eighteen hundred and eighty-four, at the city of Trenton, in the State of New Jersey, to Charles W. Lynde, her present husband, by the Rev. S. M. Studdiford, since which time she has resided and still resides in the said city of Trenton.

And your petitioner further shows that her said husband lived with her in said city of Trenton for nearly four years after their said marriage, and until the twenty-first day of December, eighteen hundred and eighty-seven, when he deserted her and left the State of New Jersey, and has never since returned to her; and that his present residence is unknown to your petitioner, and that when she last heard of him he was in Australia.

And your petitioner further shows that for more than two years last past her said husband has wilfully, continuedly and obstinately deserted her, and during all that time has wholly neglected to make any provision for her support.

And your petitioner further shows that her said husband for some time before his said desertion of her became habitually
17 *2 intemperate, and treated your petitioner in a cruel and inhuman manner, repeatedly beating and bruising her, and neglected to provide for her necessary food and clothing.

And your petitioner further shows that she became the mother of two children, born during the time of living with her said husband, to wit, Charles Wesley, born January eighth, eighteen hundred and eighty-five, and Augustus W., born November second, eighteen hundred and eighty-six, and that both of said children have deceased, Charles Wesley having died on the seventeenth day of April, eighteen hundred and ninety, and Augustus W. on the twenty-ninth day of July, eighteen hundred and ninety-two.

And your petitioner further shows that her maiden name was

Mary Y. Wright, and that she has no means of support except from her own exertions.

Your petitioner therefore prays that she may be divorced from her said husband, and that reasonable alimony may be decreed to be paid to her by the said defendant, and that she may have such further and other relief as may be equitable and just.

And your petitioner will ever pray, &c.

JAMES S. AITKEN,
Sol'r and of Counsel with Petitioner.

STATE OF NEW JERSEY, *ss:*

Mary Y. Lynde, the petitioner in the foregoing petition, being duly sworn, says that her complaint in said petition is not made by any collusion between her and the defendant in said petition
18 *3 for the purpose of dissolving their marriage, but in truth and good faith, for the cause set forth in the bill of complaint.

MARY W. LYNDE.

Sworn and subscribed this 18th day of November, A. D. 1892, before me—

JOHN G. HOWELL, *M. C. C.*

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition for Divorce.

Decree.

This cause, coming on to be heard in the presence of James S. Aitken, of counsel with the petitioner, whereupon, and upon reading the pleadings and proof in the cause and the report of G. D. W. Vroom, one of the special masters of this court, to whom, by a previous order herein, it was referred to take the depositions and other proofs offered by the said petitioner, and to report the same
19 *4 together with his opinion thereon, from all which it now appears satisfactorily to the chancellor that the marriage between the petitioner, Mary W. Lynde, and the defendant, Charles W. Lynde, was solemnized and took place in the State of New Jersey, and that the petitioner was an actual resident of and inhabitant in this State at the time of the injury complained of, and at the time of writing said petition, and that the said defendant has been guilty of wilful, continued and obstinate desertion of the petitioner during the term of two years and more next before the exhibiting of the said petition; 'tis therefore on this seventh day of August, eighteen hundred and ninety-three, by his honor A. T. McGill, chancellor of the State of New Jersey, by virtue of the power and authority of this court, and of the acts of the legislature in such case made and provided, ordered, adjudged and decreed, that the said petitioner, Mary W. Lynde, and the said defendant, Charles W. Lynde,

be divorced from the bond of matrimony for the cause aforesaid and the marriage between them is hereby dissolved accordingly, and the said parties and each of them, are and is hereby freed and discharged from the obligations thereof.

And it is further ordered, adjudged, and decreed, that the defendant pay to the petitioner her costs of this suit to be taxed, and that the petitioner have execution therefor, according to the practice of this court.

A. T. McGILL, *Chancellor.*

20 *5 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner, and CHARLES W. LYNDE, Defendant. } On Petition. Petition to Amend Final Decree.

To his honor Alexander T. McGill, chancellor of the State of New Jersey:

The petition of Mary W. Lynde, the petitioner in the above-stated cause, respectfully shows that your petitioner finds herself much aggrieved by a decree made by your honor in this cause on the 7th day of August, 1893, adjudging that your petitioner and the defendant above named be divorced from the bond of matrimony, and that the marriage between them be dissolved, &c., because the said decree omitted to order or provide for the payment to your petitioner by the said defendant of reasonable alimony. And your petitioner submits that the said decree was and is erroneous and defective by reason of the aforesaid omission, because your petitioner shows unto your honor that at the taking of the testimony in the said cause before Mr. G. D. W. Vroom, to whom it was referred for that purpose by an order duly made by
21 *6 your honor on the 14th day of March, 1893, it was alleged and strongly urged and insisted on the part of the petitioner that she was without means of support other than her own exertions, and that her husband, the said defendant, had never properly supported her, nor, indeed, contributed in any degree to her support and maintenance, as more fully appears from the master's report, filed in this cause on the 7th day of August, 1893; but that on opening the matter to your honor by the then solicitor of your petitioner, the prayer of your petitioner for alimony was not fully presented to your honor, if at all; and that, under the impression that your petitioner made no prayer for alimony, your honor, as your petitioner conceives, made the decree as aforesaid.

And your petitioner further shows that in and by her petition in the above-stated cause, duly filed on the 18th day of November, 1892, she prayed that she might be divorced from her said husband and that reasonable alimony might be decreed to be paid to her by the said defendant, and that she might have such further and other relief as might be equitable and just.

And your petitioner further shows that at various times during

the progress of the said cause she requested her then solicitor to take measures to have reasonable alimony decreed to be paid to her by the defendant, but that her said solicitor told her that, as the defendant was then very poor, it would be better not to apply for any alimony at that time, and that the best course for her interests would be to leave the whole question open, and that she could then apply for alimony at any time thereafter. But your petitioner further shows, that through the inadvertence or neglect of her
22 *7 said solicitor, the aforesaid decree was entered, making no provision whatsoever touching the payment to her of alimony, or reserving the consideration and allowance of alimony for hearing upon a future application on behalf of your petitioner.

And your petitioner further shows that she has learned only within two weeks that the aforesaid decree made no such provision, or that her right to apply for alimony at any time was thereby or otherwise in any way jeopardized, and that it has not been on account of any laches on her part that she has not made this application before.

And your petitioner further shows that she has not remarried, and that since the filing of the aforesaid decree the defendant's father, Charles R. Lynde, has died, leaving a large fortune, and that defendant has inherited from his said father, under his will, which was probated and recorded in the surrogate's office, Kings county, N. Y., on or about September 24th, 1894, about $525,000, but that the estate of his said father has not yet been settled, except that in the latter part of January, 1896, there was a partial accounting thereof had in the surrogate's court of Kings county, in the State of New York.

And your petitioner further shows that said decree herein has been settled, filed, and enrolled.

Wherefore, your petitioner prays that your honor will be pleased to vacate the enrollment, open the said decree, and amend the same by decreeing that reasonable alimony be paid to her by the defendant, and to grant unto your petitioner a writ of *ne exeat republica* issuing out of and under the seal of this honorable court, to
23 *8 restrain the said defendant, Charles W. Lynde, from departing out of the jurisdiction of this court, and that your petitioner may have such other and further relief as may be equitable and just.

And your petitioner will ever pray, &c.

Dated February 10th, 1896.

JAMES WESTERVELT,
Solicitor for Petitioner.

GEORGE H. BRICE,
Of Counsel with Petitioner.

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } Affidavit. On Petition.

STATE OF NEW JERSEY, *Mercer County*, } *ss.:*

Mary W. Lynde, being duly sworn according to law, on her oath saith:

First. That she is the petitioner in the above-stated cause, and that she was divorced from defendant above named by final
24 *9 decree entered herein on the 7th day of August, 1893, and the said defendant did not appear in said cause at any time during the progress thereof either in person or by solicitor.

Second. That from time to time, during the progress of the above-stated cause, she requested her then solicitor to take the necessary steps to provide for the payment of proper and reasonable alimony to her by the said defendant, but that her said solicitor told her that as the defendant was at that time absolutely without any means to pay any alimony it would be better to leave the whole matter open, and that she could then apply at any future time for an order for the payment of alimony; but that, as she now learns, her solicitor omitted to insert in the decree presented to the chancellor for his signature herein any provision whatever touching the question of alimony, or reserving the hearing of any motion for alimony to a future time.

Third. That, supposing she had the right to apply at any time for alimony, she has waited until a favorable opportunity, and that it would have been useless for her to apply any earlier, as the defendant had nothing, and therefore deponent had no occasion to look into the matter or to find out just what the decree contained.

Fourth. That since the filing of the decree herein the defendant's father has died leaving an estate valued at considerably over one million dollars. That the estate was only partially settled in surrogate's court, Kings county, N. Y., in the latter part of January, 1896. That the defendant has received, or is about to receive, as his share of the said estate, in actual cash, over $500,000, and that he is now amply able to pay this deponent a large amount
25 *10 of alimony, and that deponent is absolutely without any means of support except her own exertions, and that defendant has no one dependent upon him.

Fifth. That upon learning of the settlement of the estate of the defendant's said father, she immediately consulted with her present solicitor herein and requested him to take the proper steps to obtain a provision for the payment by the defendant to her of alimony. That her said solicitor, upon his obtaining copies of the papers heretofore filed herein, wrote to her at once, and on the 29th day of January, 1896, stating that the final decree in this cause had made no

provision whatever about alimony, and that the question was not reserved by that decree for future decision, and that it was very doubtful whether she would be able to open the decree on account of lapse of time.

Sixth. This deponent further alleges and declares that that was the very first she knew of the fact that the decree made no such provision, or that her right to alimony was in any way jeopardized thereby, and that since learning these facts there has been no delay on her part in making the present application for alimony.

Seventh. That defendant never supported this deponent properly, or indeed in any manner, but that on the contrary he always refused to give her any money whatsoever even for the necessaries of life.

Eighth. That deponent is informed by her solicitor and verily believes that unless the final decree herein is opened and amended to provide for the payment to her of alimony by the defendant herein, she is without any adequate remedy either at law or
26 *11 in equity for the enforcement of her just claim on the defendant herein.

Ninth. Deponent further alleges that the defendant has no property whatever in the State of New Jersey, and that he himself has removed from this State, and whenever he returns thereto he always does so in secret and endeavors to conceal the fact, and that deponent verily believes that his reason for doing so is that he wishes to avoid the service upon him of any process issued out of this court herein, and that she verily believes that the defendant will leave the country as soon as possible after he learns of this application, and that for this reason a writ of *ne exeat* is asked in addition to the opening and amendment of the decree herein, as set forth in the accompanying petition.

MARY W. LYNDE.

Subscribed and sworn to before me this 5th day of February, 1896.

G. V. W. VROOM, *M. C. C.*

27 *12 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } Affidavit. On Petition.

CITY AND COUNTY AND STATE OF NEW YORK, *ss:*

Mary W. Lynde, being duly sworn according to law, on her oath saith that she is the petitioner above named; that she has not married again since the date of the filing of the decree entered herein August 7th, 1893, divorcing her from her husband, the above-named defendant. Deponent further says that on or about the 30th of January, 1896, she talked with James W. Aitken, Esq., who was for-

merly her solicitor in the above-stated cause. That she told him that the decree as drawn by him and filed herein August 7th, 1893, did not reserve any right to her, the petitioner, to apply in the future for alimony, but said Aitken insisted that this was not so; that he had left the matter in such condition that she should have the right to apply for alimony at any time at the foot of said decree.

Deponent, however, again alleges that the matter is not left open for the future application by the terms of the aforesaid
28 *13 decree, as she is now informed by her solicitor and verily believes. That she has read the original decree of August 7, 1893, and that it makes no mention whatsoever of alimony.

Deponent further says that she did not know of this last fact, and that if she had known it she would not have known that it affected her legal right to alimony in any way, until she was informed thereof by her present solicitor herein.

MARY W. LYNDE.

STATE OF NEW YORK, }
City and County of New York. }

I, George William Burleigh, a commissioner for the State of New Jersey residing in the county of New York, in the State of New York, do certify that on the 11th day of February, one thousand eight hundred and ninety-six, the above-named Mary W. Lynde subscribed the foregoing affidavit in my presence, in the county of New York, in the State of New York, and did depose and swear that the matters therein set forth were true.

In witness whereof I have hereunto set my hand and affixed my official seal this 11th day of February, in the year one thousand eight hundred and ninety-six, in the county and State aforesaid.

[SEAL.] GEO. WM. BURLEIGH,
A Commissioner for the State of New Jersey.

29 *14 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } Affidavit. On Petition.

NEW JERSEY, *ss:*

James Westervelt, being duly sworn according to law, on his oath, saith that he is an attorney-at-law and solicitor in chancery of New Jersey, and an attorney and counsellor-at-law in the State of New York, and that on or about the 20th day of January, 1896, he was retained to act as solicitor for the petitioner herein, for the purpose of obtaining and compelling the payment of alimony to her by the defendant, and that he has been duly substituted as solicitor for the petitioner herein.

That deponent was informed by petitioner that she had been divorced from defendant in 1893, by decree of this court, but that no

alimony had been decreed to be paid, and that the matter had been left open. That deponent thereupon, as speedily as possible, obtained copies of the petition, master's report, testimony and final decree heretofore filed in this cause, besides other papers. That deponent discovered on examination of said papers that the petitioner

30 *15 prayed for divorce, and also that reasonable alimony be decreed to be paid to her by defendant herein. That all papers and proceedings herein were regular and according to law, and that the final decree filed herein on August 7th, 1893, made no mention of alimony, and that it was neither decreed that any alimony to any specified amount should be paid, nor that an application for the same might be made by petitioner thereafter. That no disposition whatever appears to have been made of the said prayer for alimony contained in the petitioner's petition, heretofore, and on the 18th of November, 1892, duly filed in the above-stated cause.

Deponent further says that the master's report and testimony filed therewith show that the defendant is dissolute and extravagant, and that he has never contributed in any way whatever to the support of the petitioner. Deponent is informed and believes that the defendant intends to avoid the jurisdiction of this court, and that it is more than probable that he will leave the country on being informed of this present proceeding, and that unless a writ of *ne exeat* is granted and can be served on the defendant he will so leave the country. Deponent further says, on information and belief, that the petitioner has not remarried since the filing of the aforesaid decree on the 7th of August, 1893, and that she has no means of support other than her own exertions, and that the defendant has no one dependent upon him. Deponent further says that he has had several interviews with the petitioner, and has questioned her closely relative to the circumstances, attendant upon the entry of the aforesaid decree, and which have occurred since, and that he is convinced that she has been guilty of no laches or neglect in making the present application, and that she did not know, until informed by this deponent, that the aforesaid decree did not make the proper provision for alimony.

31 *16 That it appears by the records in the surrogate's office of Kings county, N. Y., that one Charles R. Lynde died since August 7th, 1893, leaving a will which has been probated, and was recorded in said surrogate's office in Liber 196, page 153 of wills, on or about September 24th, 1894. That deponent is informed and believes that said Charles R. Lynde was the father of Charles W. Lynde, defendant. Deponent further says that by the will of Chas. R. Lynde, after leaving minor specific legacies, makes the defendant Charles W. Lynde and his brother the sole residuary legatees. That it appears from a partial accounting by the Long Island Loan & Trust Company, executor, &c., under the will of Chas. R. Lynde, deceased, settled in said surrogate's court on the 20th day of January, 1896, that defendant's share of said estate will be, all told, about $525,000. Deponent further says that he knows of no method and has been unable to discover any after diligent search, existing under the laws of New York, to enforce the petitioner's just claim against

the defendant unless the decree herein, filed August 7, 1893, is opened and the enrollment vacated as requested in the accompanying petition.

JAMES WESTERVELT.

Subscribed and sworn to before me this 10th day of February, 1896.

PIERRE F. COOK,
Master of Chancery of New Jersey.

32 *17 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } Order to Show Cause. On Petition.

Upon opening this matter to the court by James Westervelt, solicitor of the petitioner, and upon reading and this day filing the petitioner's petition in the above-stated cause, dated Feb. 10th, 1896, and upon the final decree heretofore entered herein and to amend the same by decreeing that reasonable alimony be paid to the petitioner by the defendant, and for other relief as therein set forth, and also the affidavits of Mary W. Lynde, petitioner herein, sworn to Feb. 5th and Feb. 11th, 1896, respectively, and the affidavit of James Westervelt, solicitor for the petitioner herein, sworn to the 10th day of Feb., 1896, setting forth the previous progress of this cause, and that defendant has recently inherited over half a million dollars and has no one dependent upon him, and that petitioner has no means of support other than her own exertions, and on motion as aforesaid,

It is, on this fourteenth day of February, eighteen hundred and ninety-six, ordered that said defendant, Charles W. Lynde,
33 *18 do show cause before the chancellor on the twenty-fourth day of February instant, at the chancery chambers in Jersey City, why the prayer of said petitioner should not be granted, and such further relief be granted in the premises as shall appear equitable and just.

And it is further ordered that certified copies of said petition and of this order, and also of the affidavits accompanying said petition, be personally served upon said defendant, Charles W. Lynde, on or before the nineteenth day of February inst., if the same be served without this State, or on or before the twentieth day of February inst., if the same be served within this State.

ALEX. T. McGILL, *C.*

In Chancery of New Jersey.

MARY W. LYNDE
vs.
CHARLES W. LYNDE. } On Petition to Amend Decree, &c.
Memorandum.

Mr. James Westervelt, 58 Wall street, N. Y., for petitioner.
Mr. J. Herbert Potts and Mr. C. H. Voorhis, for the defendant.

The CHANCELLOR: It is asserted, on behalf of the petitioner, that the decree in this case failed to include any provision for
34 *19 alimony because of the neglect of the petitioner's solicitor, who did not carry out the petitioner's instructions in that behalf, and, upon the other side, it is alleged that the failure to ask for alimony, when the decree was taken, was the deliberate act of both the petitioner and her counsel, with intent to give up alimony in order to facilitate them in obtaining a decree for divorce.

I think that the exact state of facts should be definitely ascertained by taking affidavits, and I will therefore direct the taking of affidavits upon this issue upon two days' notice, and direct that they be presented on the 20th instant at the Jersey City chambers. Both the petitioner and her former counsel should be examined and cross-examined.

ALEX. T. McGILL, *C.*

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition to Amend Decree.

Testimony taken pursuant to a memorandum of the chancellor in the above-entitled cause, by consent, before Albert C. Wall,
35 *20 Esquire, master in chancery, this fifteenth day of April, eighteen hundred and ninety-six, at the office of J. Herbert Potts, number one Montgomery street, Jersey City.

Present: James Westervelt, Esq., solicitor of petitioner, and J. Herbert Potts, Esquire, solicitor of defendant.

It is consented that the testimony be taken stenographically and the signatures waived.

ALBERT C. WALL,
Master in Chancery of N. J.

MARY W. LYNDE, the petitioner, being duly sworn according to law, on her oath, testifies as follows, being examined by Mr. Westervelt:

Q. You are the petitioner, Mrs. Lynde?

A. I am.

Q. And Mr Aitken, present here, was your solicitor in obtaining a divorce?

A. He was.

Q. Did you give him any instructions?

A. I gave him instructions so far as I wished a divorce with alimony.

Q. What were your instructions?

Objected to as incompetent.

Q. State what took place at that time.

A. I went to Mr. Aitken's office and told him I wished a divorce with alimony, and told him to go ahead and proceed with it, which he did.

Q. Did you have any other interview with him during the progress of this suit?

A. I did; several.

Q. What took place at those interviews?

36 *21 A. I interviewed him as to his progress in the case, and whether he had heard from Mr. Lynde, whether he had given him due notice or not, also whether he had in his order of publication advertised for alimony, etc., and he assured me he had.

Q. You say you asked him questions respecting a decree for alimony?

A. I did; that was one of my main reasons for getting the divorce. I knew Mr. Lynde would inherit money, and for that reason I was particular to have it in the decree.

Q. Did you ever for any reason instruct Mr. Aitken not to have anything put in the decree concerning alimony?

A. I did not.

By Mr. POTTS:

Q. When did you first see Mr. Aitken about this divorce?

A. In the latter part of October or first of November, I think; it may have been in the month of October.

Q. What year?

A. 1892.

Q. And you say that your principal reason for getting a divorce was to get alimony out of the defendant?

A. Yes, my principal reason was that.

Q. And you remember testifying when the case was pending? Do you remember testifying in the case?

A. I do.

Q. Do you remember whether you stated or not that you did not consider the defendant worth anything at all; that you only wanted your divorce?

A. I never stated I did not consider the defendant worth

37 *22 anything, because I knew he would be worth something from the past conversations I had and not only with him but with his family.

Q. You remember when the suit was pending, do you not?

A. I do.

Q. Do you remember when the notice was published in the papers?

A. Yes, it was.

Q. Do you remember seeing that notice?
A. I do.
Q. There was only one notice published, wasn't there?
A. There were several published.
Q. I understand you to say you saw the publication in the case?
A. I did.
Q. And there were several, you say?
A. There was.
Q. Several of one kind, or different kinds?
A. Several of the same kind published each week.
Q. All one notice published at different times?
A. Yes.

By Mr. WESTERVELT:

Q. You knew, did you not, at the time this former suit was pending, that your husband would inherit considerable property?
A. I did.
Q. You had that in mind throughout that suit?
A. I did.
Q. And you knew that at the time the suit was begun he had nothing?
A. I did.
Q. In your petition, Mrs. Lynde, in this proceeding, it is stated that you at various times requested Mr. Aitken to take measures to have reasonable alimony decreed to be paid to you by the
38 *23 defendant, but that he told you that as the defendant was then very poor it would be better not to apply for any alimony at that time, and that the best course for your interests would be to leave the whole matter open, and that you could then apply for alimony at any time thereafter. Is that true?
A. That is true.
Q. And you supposed that that would be done?
A. I did; I had no idea but what it was done.

JAMES S. AITKEN, a witness produced on the part of the petitioner, being duly sworn, according to law, on his oath, testified as follows, being examined by Mr. Westervelt:

Q. Mr. Aitken, you were retained some time in the year 1892, were you not, to act for the petitioner in obtaining a divorce?
A. I was.
Q. At the time that you were retained to act in this cause, were you given any instructions by the petitioner?
A. Of course I received my instructions from the petitioner.
Q. State what they were.
A. It was to obtain a divorce and incidentally for alimony, and the prayer for alimony was included in the petition; it was drawn, filed and sworn to.
Q. Why was there no provision inserted in the decree, Mr. Aitken?
A. It was an omission which occurred in this way; let me ex-

plain the matter. Before the sitting of the master, after the order of reference had been taken, Mrs. Lynde and myself had several conversations in regard to the matter of alimony, expecting, of course, to put in testimony before the master for an allowance of alimony. We could find nothing to base an order for ali-
39 *24 mony upon; the defendant was out of the country, had led a miserable vagabondish existence, and as far as any practical result could be obtained, was worthless. The fact of his father being a wealthy man I considered would not be sufficient to found a decree for alimony upon at that time, therefore there was no testimony put in before the master on the subject, intending to hold that matter in abeyance for a future application, and no testimony was taken, and nothing said about alimony before the master or in the report. Before the chancellor had granted the decree, after I had put the decree on file, as my custom was to file a decree in blank for the chancellor to sign; in drawing that decree it was my intention to provide for a future reference for alimony, and I supposed I had. I followed the precedents in Dickinson, which I find do not include any order for alimony, and that is the only way I can account for the omission to provide for alimony. It was my intention to do it, and I supposed I had done it; it was not until yesterday that I knew the decree did not contain a request for alimony. My intention was the decree should contain a clause for further relief, as the circumstances of the case might require. I supposed that was in the decree, and knew not to the contrary until yesterday, when I examined a copy of the decree and found, to my great surprise, that it was not in

By Mr. POTTS:

Q. You remember when this case was pending? Do you remember seeing Mr. Chauncy Beasley at any time?

A. After the order of reference had taken place.

Q. Do you remember having a conversation with him in relation to this case?

A. He came in and made an inquiry.

Q. That inquiry was of what nature?

A. As to what was the basis of the proceedings against the defendant.

40 *25 Q. Did he make any further inquiry during the pendency of the suit?

A. I told him the cause alleged was desertion, and he said he came representing Mr. Lynde, and supposed there was nothing further for him to do.

Q. Did you have any further conversation with him?

A. I think that was about the extent of the conversation.

Q. Do you remember at that conversation whether there was anything said about alimony?

A. I don't recollect that there was.

Q. Do you recollect it distinctly?

A. I recollect his being there.

Q. Was he there more than once to see you?

A. Only once.

Q. Only to see you once during the pendency of this suit?

A. After the order of reference it was too late for him to make any appearance or put in any defense; that is my recollection.

Q. And you made known to him fully the condition of affairs?

A. I told him what was the cause of the complaint.

Q. Did you make known to him the desires or wishes of the petitioner? Was there anything said in the conversation about her wishes in the matter?

A. No; not that I recollect of; not that I know of.

Q. And he told you who he represented?

A. He said Rollin Lynde had sent him there; that Rollin Lynde had corresponded with him, and he came in response to that to see how the case stood.

Q. And Rollin Lynde is whom?

41 *26 A. Brother of the defendant in the case, as I understand.

Q. And he was a lawyer in New York, was he not?

A. I understand so, I have never seen him.

Q. You remember having frequent conversations with the petitioner about this defendant during the time, do you not?

A. Yes.

Q. And you did not know him personally?

A. No; never saw him.

Q. And all the information you had about him was what you received from her?

A. Yes.

Q. And when you say that he was a worthless, rolling, rambling man, that was based upon the information that you received from her?

A. And letters which she had.

Q. Do you remember having any conversation with her about whether or not this man was to be disinherited or anything to that effect? Do you remember having any conversation or learning from her that this defendant was by reason *for* his worthlessness to be disinherited?

A. The matter was talked about as to whether his father would leave him anything on account of his bad habits.

Q. So there was something said about that?

A. Incidentally.

Q. And at that time he was considered not good; worthless?

A. He was decidedly bad.

Q. And that was her estimate of him, was it not?

A. Yes, sir.

Q. Have you had any conversation since this one that you speak of with Mr. Beasley?

A. No, sir; not on that subject.

42 *27 Q. Since this divorce you had a talk with this petitioner?

A. The first talk was last winter when she came after the death of her father-in-law, when she was about to proceed for alimony and she came to me for an order of substitution of the gentlemen here as solicitor- in my place, and on the ground that they were

living in New York and knew all the circumstances of the case, and could appear and apply for it instantly, and I acquiesced in the appointment.

Q. Did she say anything to you about taking you to task because of your failure in the matter?

A. I think not at that time.

Q. Was there anything said about the decree at that time?

A. I think not; at a subsequent time she came and said the solicitor said there was no application for alimony in the decree.

Q. Mr. Aitken, this decree was written all out in long hand in your own handwriting?

A. That is my recollection.

Q. And the reservation was not included in it because you did not consider it necessary at that time?

A. No, that is not so; it was intended to be entered in and included in the decree.

Q. Why wasn't it done?

A. I cannot say, except that I followed the precedents in Dickinson and that has no allusion to it.

Q. Didn't you say to me the reason you drew it that way was because you didn't think it was necessary to put in a reservation for alimony?

A. No, sir, I did not.

Q. Didn't you say that that was your interpretation or understanding of the law in that respect?

A. May I *answer* what you refer to?

43 *28 Q. I am only asking you if you didn't tell me that?

A. I did not.

Q. So that you cannot give any reason why the alimony or reservation for alimony was not included in that?

A. I cannot give any reason except that it was a clear case of omission; I did not know it until yesterday.

Q. Didn't you hear that the decree did not include alimony?

A. She told me she had heard from her lawyers, and I supposed it was in that decree, a clause for further relief. What you refer to in the answer I gave you, whether alimony was not ordered, the amount of alimony was to be fixed and ordered, that was purposely omitted because we had no grounds upon which to base that; that was what I told you.

Q. You remember seeing me in your office?

A. Yes.

Q. Some three or four weeks ago?

A. Yes, I don't know exactly, it was before your time was fixed for the first hearing.

Q. And I came to see you particularly about this matter?

A. Yes, sir.

Q. And you had a conversation with me about it about five o'clock in the afternoon?

A. Yes, sir.

Q. But you don't recollect that you didn't understand it was

necessary to put a reservation for alimony in order to subsequently seek it?

A. I didn't ask that way; I wouldn't ask that way.

By Mr. WESTERVELT:

Q. Didn't Mr. Potts, when he came to see you, ask you to
44 *29 make an affidavit with reference to this case, setting forth just the facts he has drawn your attention to now? Didn't he ask you to make an affidavit in reference to this cause?

A. Yes, Mr. Potts asked me if I recollected the case; he asked me if I had seen her lately; I said not since the order of substitution was obtained; he wanted to know if they charged negligence toward me on the application for alimony; he took up a paper and read from it. I said, I am not negligent in the transaction. I had reference to not fixing the alimony in the decree; I supposed he had reference to that alimony to be paid at that time. I supposed that was done with her consent, because we had nothing to base alimony upon at that time.

Q. And that reference was to alimony then?

A. Yes; I did not feel justified in making an affidavit, and that was about the whole of the conversation. Mr. Potts is one of my old friends, and we had a little conversation about other matters and he said good day and left.

Q. There was never any positive statement made to you in the course of this former suit on Mrs. Lynde's part, to the effect that she supposed the defendant was to be disinherited?

A. Mere talk that such a thing might be.

Whereupon the examination was adjourned.

ALBERT C. WALL,
Master in Chancery of New Jersey.

45 *30 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition, etc. Motion.

SIR: Please take notice that the deposition of witnesses will be taken under the order of the chancellor lately made in the above-entitled cause on behalf of the defendant, at the office of Judge Chauncy Beasley, 145 East State street, Trenton, New Jersey, on Wednesday, April twenty-ninth, eighteen hundred and ninety-six, at 4 p. m., before Rutherford Coleman, Esquire, one of the masters and examiners of the above court.

Your obedient servant, J. HERBERT POTTS.

To James Westervelt, Esq., solicitor for petitioner.

46 *31 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition, etc.

Depositions taken, pursuant to notice, before Rutherford Coleman, master and examiner of the court of chancery of the State of New Jersey, on the 29th day of April, eighteen hundred and ninety-six, at his office, 145 East State street.

Present: Mr. Carroll Robbins on behalf of Mr. James Westervelt, solicitor for the petitioner, and J. Herbert Potts on behalf of the defendant.

Taken stenographically and signature of witness waived.

CHAUNCY H. BEASLY, being duly sworn according to law, testified as follows:

Direct examination by Mr. POTTS:

Q. You are a counsellor-at-law?

A. Yes, sir.

Q. You have been a member of the bar how long?

A. Since 1883.

47 *32 Q. Have you been practising here in Trenton during that period?

A. During part of the period; I have been in Trenton since 1887.

Q. You were practicing here in 1893?

A. Yes, sir.

Q. Do you know Mr. Roland Lynde?

A. I do not.

Q. You know of the case of Mary W. Lynde against Charles W. Lynde?

A. I do.

Q. Were you retained in that case for either party during the year 1892 or 1893?

A. About the month of March, 1893, I received a letter from Roland H. Lynde, from New York, requesting me to represent him in a divorce suit, which was then pending in the court of chancery of New Jersey. My instructions from him——

Q. Did he state what case it was?

A. Yes; the case of Lynde against Lynde. From an examination of my correspondence with him at that time I find that I was employed by him for the purpose of opposing any application for alimony in that suit.

Objected to on the ground that the witness cannot give his instructions from his client in the case.

It is consented that the objections to evidence are to be ruled on by the chancellor on the argument of the application.

A. My instructions from Mr. Lynde were that he did not desire to contest the divorce which was being sought for unless there had been a petition for alimony, in which case he should endeavor to resist any such application.

48 *33 Q. This, of course was the Roland Lynde that you speak of?

A. Yes, sir; he was the only person that I knew in the matter. He stated to me that he wished me to do nothing else in the matter, except ascertain whether there was to be any application for alimony made, or any attempt to obtain a decree for alimony. This is my recollection of the matter.

By Mr. ROBBINS:

Q. Does this all appear by letter?

A. Yes.

Q. Then I can see that there might be objection to parts of the letter going in evidence?

A. Those letters were the first two letters that I received from Mr. Lynde in the case.

Direct examination continued:

Q. The following letter bearing date March 1st, 1893, marked Exhibit D 1, and letter bearing date March 3d, 1893, D 2, offered in evidence on the part of the defendant.

Objected to by Mr. Robbins as irrelevant and incompetent.

Copy of Exhibit D 1.

NEW YORK, *March 1st*, 1893.

In Chancery.

MARY W. LYNDE
vs.
CHARLES W. LYNDE.

Hon. Chauncy Beasley, Trenton, N. J.:

About the 30th of December last I received from James S. Aitken, of Trenton, a request to send to him the address of the de-

49 *34 fendant (my brother) who is in Australia, as he wished to serve him with the papers in this action for divorce. The address was sent to him and as service by publication is effected in this State by six weeks' publication and then the defendant has twenty days after that in which to answer, I paid no further attention to the matter until February 27th, when I wrote to Mr. Aitken asking him if he had effected service on the defendant, and, if so, when the time to answer would expire as we did not wish the suit to go against the defendant by default, and he wrote back that service was effected by publication, and that the defendant's time to answer expired February 25th. I would like to retain you to defend my brother, who is, I presume, in Australia. The last letter received from him was mailed in Australia, October 18th, 1892.

He was in the class of '83 at Princeton, until the first or second term senior year, when he left college and went to a commercial school at Trenton. If his default has really been entered, as to which you can find out by seeing Mr. Aitken, it can of course be opened, and I would like you to do it as my brother has a complete defense to the action. Please let me hear from you very soon and oblige,

Yours very truly, ROLLIN H. LYNDE.

Copy of Exhibit D 2.

NEW YORK, *March* 3*d*, 1893.

Hon. Chauncy H. Beasley, 145 E. State street, Trenton, N. J.

DEAR SIR: Yours of the 2d inst. asking for retainer received and I enclose my check for $25, no amount being specified in your letter. If more is necessary let me know.

50 *35 Our only object in opposing the suit is to prevent a judgment for alimony. My brother has absolutely nothing at present, but is earning his living, I hope, in Australia, where he went because he could not make a success here. A claim for alimony could not be enforced now, but may inconvenience him later.

If plaintiff insists upon alimony, I believe we can show there was no wilful or continued abandonment, and that no cruelty can be shown justifying a divorce. If plaintiff will waive alimony she is welcome to her divorce. That is the only point which interests me, and I leave it to your judgment to take the surest course to accomplish this end. If you see no objection I should prefer to have this point settled before you even appear in the case.

Yours very truly, ROLLIN H. LYNDE.

A. I then inspected the records of the court of chancery and to the best of my recollection ascertained that there was no prayer in the petition or bill, whichever it was, for alimony. I think I reported this fact to Mr. Rollin Lynde. The matter went along and I received another letter from Mr. Lynde, bearing date June 28th, 1892, which I offer in evidence, the same being marked Exhibit D 3.

Copy of Exhibit D 3.

NEW YORK, *June* 28, 1893.

LYNDE
vs.
LYNDE.

Hon. Chauncy H. Beasley, 145 East State street, Trenton, N. J.

DEAR SIR: Yours of the 26th received and I note that you

51 *36 say nothing as to the provision of the master's report, especially concerning the all-important question of alimony. You have doubtless kept in mind my letter to you of March 3d last and have carefully arranged that there shall be no provision or

direction for alimony either in the report or the decree. In our State, although the decree may be entirely silent as to alimony, it is possible, by subsequent motion, to have the court grant this to the successful party. To guard against anything of that kind it is necessary to have the provision in the decree expressly stating that the divorce is granted without alimony.

Please let me know what steps you have taken to protect my brother's interests in this respect. What does the master's report provide concerning alimony? Have you any written stipulation with plaintiff's attorney that no alimony shall be sought or granted and can you have inserted in the decree a provision preventing any question as to this in the future?

I leave for the Adirondacks on Friday afternoon. Please let me have your reply before then.

Yours very truly, ROLLIN H. LYNDE.

Same objections as to the other letters.

A. And in reply to that letter I wrote the following letter which is the original, dated June 29th, 1893, which letter is offered in evidence and marked Exhibit D 4.

Same objection as before.

52 *37 *Copy of Exhibit D 4.*

TRENTON, N. J., *June* 29, 1893.

Rollin H. Lynde, Esq., 31 Pine street, New York city.

DEAR SIR: In reply to your letter of yesterday I beg leave to say that I perfectly understood the position you desired me to take in your brother's divorce suit. I very carefully inspected the record and no application for alimony has been or will be made. You may rest assured that no decree will be made granting alimony.

I will keep you informed as to the progress of this suit.

Very truly yours, CHAUNCY H. BEASLEY,
Per L.

Q. Prior to writing Exhibit D 4 had you consulted with Mr. Aitken, the solicitor of the petitioner?

A. From an examination of the letter and to the best of my recollection, also from an examination of the correspondence in this case, which showed me that my whole duty in the matter was to ascertain whether there should be or would be any attempt to have a decree for alimony. I saw Mr. Aitken with regard to the matter before signing the decree. My recollection is that it was before the master's report, but of this I will not be certain. My recollection is that I asked Mr. Aitken whether he intended to ask or seek for alimony in this case. His answer was that he did not desire alimony, and was not instructed, I think his words were, by his client, to ask for alimony. My recollection is that after I had seen Mr. Aitken I wrote the last letter dated June 29th, 1893.

53 *38 Q. Then you have stated all that you recollect in connection with this matter up to the present time?

A. There was some further correspondence with regard to the case, but I do not think anything with reference to the subject-matter in dispute now.

Witness is shown letter dated March 17th, 1893, and is asked whether he remembers receiving that letter.

A. Yes.

Letter offered in evidence and marked Exhibit D 5.
Same objection as before.

Copy of Exhibit D 5.

NEW YORK, *March 17th*, 1893.

LYNDE
vs.
LYNDE.

Chauncy H. Beasley, 145 East State street, Trenton, N. J.

DEAR SIR: I have not heard from my brother since last November, when he wrote from Waldett, New South Wales. Letters sent there will probably be forwarded to him if he has left.

I know that you will bear in mind that the only object of your retainer was to prevent any judgment for alimony, and that you will use your discretion in effecting this end.

Yours truly, ROLLIN H. LYNDE.

54 *39 Cross-examination by Mr. ROBBINS:

Q. Your only connection with the matter was through Rollin H. Lynde, as — understand it?

A. Yes.

Q. And you never met him?

A. Not to my recollection.

Q. With regard to what passed between yourself and Mr. Aitken at the interview, do you base your recollection in large part on the letters you received and wrote?

A. I base it upon that and also upon the fact that my instructions were to ascertain and do everything in my power to find out whether there would be any attempt to have a decree for alimony.

Q. Do you remember in the conversation that Mr. Aitken and you had, referring to temporary alimony, or anything of that kind?

A. I do not remember that anything was said about temporary alimony.

Q. Was the subject of alimony discussed between you?

A. Yes, sir; as I said before, I asked Mr. Aitken whether he intended to seek for a decree for alimony; his answer was no.

Q. Why did you ask that question if there was no reference to alimony in the petition for divorce?

A. Because I thought perhaps he would amend his petition, and I knew I was not on record and would not be served with any notice.

Q. Is that the only reason?

A. Well, I think it was natural for me to seek for all the enlightenment on the subject I could, to obey the instruction of my client.

Q. Did you not inquire of Mr. Aitken as to the grounds for which the petition or bill was filed?

A. I may have done so, although I think I had inspected the record at that time.

55 *40 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition, &c. Notice.

SIR: Please take notice that the depositions of witnesses will be taken under the order of the chancellor lately made in the above-entitled cause on behalf of the defendant, at the office of J. Herbert Potts, on Montgomery street, Jersey City, New Jersey, on Friday, May first, eighteen hundred and ninety-six, at four p. m., before William G. E. See, Esquire, one of the masters and examiners of the above court.

Yours, J. HERBERT POTTS.

To James Westervelt, Esquire, solicitor of petitioner.

56 *41 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition, &c. Depositions.

Depositions of witnesses, taken pursuant to notice, before William G. E. See, Esquire, master in chancery of New Jersey, at the office of J. Herbert Potts, one Montgomery street, Jersey City, New Jersey, this first day of May, eighteen hundred and ninety-six.

Present: James Westervelt, counsel for petitioner, and J. Herbert Potts, counsel for defendant.

It is consented that the testimony be taken stenographically and the signatures of the witnesses waived.

ROLLIN H. LYNDE, a witness produced on the part of the defendant, being duly sworn according to law, on his oath testified as follows, being examined by Mr. Potts:

Q. You are a counsellor-at-law of the State of New York?

A. I am.

Q. And have been practicing there for how long?

A. Fifteen years.

57 *42 Q. You are a brother of Charles W. Lynde, the defendant in this suit, are you not?

A. I am.

By Mr. WESTERVELT: Any and all letters between Judge Chauncy Beasley and Mr. Rollin H. Lynde are objected to as to relevancy and competency, to be passed upon by the chancellor.

Q. Do you remember when these proceedings were brought in this case of Mary W. Lynde against your brother, Charles W. Lynde?

A. Yes, sir; about the time.

Q. Do you know of Mr. Chauncy H. Beasley, of Trenton, New Jersey?

A. Yes, sir.

Q. Did you employ him in this suit of Mary W. Lynde against your brother, Charles W. Lynde?

A. I did.

Q. For what purpose did you employ him?

A. Simply for the purpose of seeing that no alimony was granted in the suit.

Question and answer objected to as irrelevant. Witness being shown Exhibit D 1 of the previous hearing, is asked:

Q. Is that your signature?

A. Yes.

Q. Was that letter written at the time it bears date by you?

A. It was, or rather dictated by me and written by a stenographer in my office.

Q. And signed by you?

A. Signed by me.

58 *43 Witness being shown Exhibit D 2 is asked:

Q. Is that your signature?

A. Yes.

Q. Was that written by you at the time it bears date?

A. It was.

Q. And sent by you to Judge Beasley?

A. It was.

Q. Exhibit D 1 was also forwarded by you to Judge Beasley?

A. Yes.

Witness being shown Exhibit D 3 is asked:

Q. Is that your signature to that letter?

A. It is.

Q. Was that letter written by you at the time it bears date, or written in your office at the time it bears date?

A. It was.

Q. And signed by you?

A. It was.

Q. And forwarded to Judge Beasley?

A. It was.

Witness being shown Exhibit D 4 is asked:

Q. Did you ever see that paper before?

A. I did.

Q. What is it?

A. It is a letter written to me by Chauncy H. Beasley in connection with the suit in which I retained him, Lynde *vs.* Lynde.

Q. And was it received on or about the time it bears date?

A. It was, sir.

59 *44 Witness being shown Exhibit D 5 is asked:

Q. Is that your signature?

A. It is not. It is the signature of my clerk, put there by my authority.

Q. Was the letter written under your directions and by your authority at the time it bears date?

A. It was.

Q. It appears to have been written stenographically wasn't it?

A. Yes.

Q. And dictated by you?

A. Yes.

Q. You never saw Mr. Beasley personally then?

A. I never did.

Q. All your dealings with him were by letters, most of which have been shown to you, have they not?

A. Yes.

Witness states that so far as any connection between attorney and client, he waives the same as between Judge Beasley and himself.

Q. And you have authorized him to tell the facts as he remembered them in this case, have you not?

A. Yes, sir.

Q. You were not in Trenton at the time yourself?

A. I was not.

Q. At the time these proceedings were taking place, the divorce proceedings, or the period between which this correspondence ran?

A. No.

60 *45 Witness being shown paper bearing date October 28, 1893, is asked:

Q. What is that?

A. That is a letter received by me on or about October 28, 1893, from Chauncy H. Beasley, in connection with this suit of Lynde *vs.* Lynde, in answer to a letter I sent him.

By Mr. WESTERVELT: Objected to on the ground that it is irrelevant, because the defendant not having put in any defense and not having shown either then or now that he had any defence to the action, it could have made no difference what provisions there were in the decree as to alimony, for the reason that defendant would have had no right to object to any such provision either for the payment of alimony at that time or reserving the right to apply in the future for alimony. And I enter the same objection to all this evidence as to what passed between Mr. Beasley and Mr. Rollin H. Lynde.

Paper referred to is offered in evidence and marked Exhibit D 6.

Cross-examination by Mr. WESTERVELT:

Q. You say, Mr. Lynde, that you are a counsellor-at-law in New York; how long have you been?

A. Since 1880.

Q. You stated about December 30, 1892, you received a letter from James Aitkin, asking for the address of the defendant, as he wished to serve him with papers in this action; is that the fact?

A. Yes, sir.

Q. Is it a fact that about two months after receiving the
61 *46 letter from Mr. Aitken you wrote to him asking him whether Mr. Charles W. Lynde was in default yet?

A. Yes, sir; whatever is in that letter is a fact.

Q. Can you tell me why, being a lawyer, you let eight weeks elapse before paying any attention to that letter?

Objected to.

A. I can, sir.

Q. Why?

A. I did not intend to touch the matter at all until my father came in and asked me to take care of the matter, preferring that the correspondence should be carried on between Mr. Beasley and myself, rather than himself and Mr. Beasley, Mr. Beasley being a Princeton man and I being a Princeton man, and he being in college about the same time I was.

Q. Have you seen any of these exhibits since the date and prior to this examination?

A. I have seen one letter signed by Chauncy Beasley to me that is in evidence.

62 *47 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.
} On Petition, &c. Opinion.

A decree for alimony cannot be made against a defendant who is not served with process for appearance, does not appear in the cause and has no property within control of the court.

Alimony is not an independent claim or right, it is incidental to a bill for divorce or other relief, between husband and wife.

Whether it can be had after a final decree in the divorce case, which is silent as to it, except through amendment of the decree, quære.

While this court will not vary or alter an enrolled decree in a material point, without a bill of review or a rehearing, it will, upon petition, amend its enrolled decree, when the amendment is necessary to give full expression to its judgment, and is matter which would, without doubt, have been incorporated in the decree when made, if attention had been called to it.

On petition of Mary W. Lynde, which seeks the vacation of the enrollment in this cause and amendment of the decree made
63 *48 on the 7th of August, 1893, by the addition of a clause thereto which shall reserve to the court the right to allow alimony to the petitioneer and to regulate the amount thereof from time to time.

Mr. James Westervelt, for the petitioner.

Mr. J. Herbert Potts, for the defendant.

The CHANCELLOR: The petition for divorce in this case was filed in November, 1892, by James S. Aitkin, Esq., as the solicitor for the petitioner. When it was filed the defendant did not have any property, but his father was alive and was a man of considerable wealth. In giving her solicitor instructions the petitioner discussed this fact with him, and the probability of the defendant ultimately having bounty or inheritance from his father. She was anxious that she should obtain a decree which would admit of her having alimony thereafter, the amount of which could be fixed according to her husband's wealth, and accordingly her petition contained a prayer for alimony.

When the petition was filed the defendant was not resident in the State, and, upon proof of that fact, he was proceeded against as a non-resident or absent defendant. Notice was duly published and mailed to him, which expressly declared that the suit was for divorce from the bond of matrimony "and for alimony." The defendant was not served with process and did not appear in the suit.

Knowledge of the pendency of the suit reached his brother, a lawyer in the city of New York, who, at the instance of his father, retained a solicitor of this court, to prevent, if possible, the entry of a decree for alimony, but not to contest the application for divorce.

64 *49 It was the object of the father and brother to have the decree to be made in the case, expressly provide that there should be no alimony, and, if possible, secure a written agreement to such a decree. The testimony of the solicitor so employed is that he examined the petition for divorce and found that it did not pray for alimony and that he had an understanding with Mr. Aitken that a decree for alimony would not be demanded. It is evident from the fact of the presence of the prayer for alimony in the petition that the recollection of the solicitor upon that point is at fault, and, as Mr. Aitken has no remembrance of making any agreement with him to the effect that alimony should not be demanded, his memory or understanding of the effect, of his interview with Mr. Aitken, possibly, is at fault there also. But, however, that may be, the solicitor thus employed did not enter an appearance for the defendant in the suit. Nor did he undertake to act for the defendant. Any such agreement as is insisted upon should have been in writing to entitle it to recognition by the court.

Mr. Aitken's client's instructions forbade any agreement which would abandon alimony. In preparing the decree in the case it is clear that Mr. Aitken did not deem himself to be bound in any way

to omit reference to alimony. His testimony is that it was his purpose to draw the decree as to reserve for the petitioner the right to thereafter have alimony. He says that it was impossible at that time to have any amount of alimony allowed fixed because the defendant then led a worthless, vagabondish existence. He attributes his failure to make the proposed insertion in the decree solely to the facts that in drawing that document he followed a form which did not contain the provision, and that through inadvertence he
65 *50 omitted it. Neither he nor his client became aware of his omission until about the time of making the application. As the proofs stand, I think that the agreement insisted upon is not proven, and that the omission in the decree is shown to have arisen through inadvertence.

As the decree was against the absent defendant, who was not served with process, did not appear in the case, and did not have property which was under the court's control, it could not have given alimony. A judgment *in personam* in favor of the wife (Brown on Jurisdiction, sec. 11; 2 Bishop M. D. & S., sec. 844; Brown on Divorce, 267).

At best it could only have reserved question as to the allowance of alimony for future determination upon application to be made upon due actual notice to the defendant.

By the unwritten law alimony is not a matter of independent claim or right (2 Bishop M. D. & S., sec. 839; I *id.*, sec. 1368). It is incidental to a bill for divorce or other relief between husband and wife (Anshutz *vs.* Anshutz, I C. E. Gr., 162; Miller *vs.* Miller, Saxton, 386; Yule *vs.* Yule, 2 Stoc., 138; Cory *vs.* Cory, 3 Stock., 400; Rockwell *vs.* Morgan, 2 Beasley, 119, 121). The 19th section of our statute, Gen'l Laws, 1269, treats of it as attendant upon a suit for divorce. It declares that "when a divorce shall be decreed, it shall and may be lawful for the court of chancery to take such order touching alimony and maintenance of the wife" * * * "by the husband, as, from the circumstances of the parties and the nature of the case shall be fit, reasonable and just," and where the wife is the complainant in such a suit, to require security from the husband, and in its default to sequester his personal estate
66 *51 and the rents and profits of his real estate and apply the same to such maintenance and allowance as to the said court shall from time to time seem reasonable and just."

The contemplation of the legislature in this section is, that, when the divorce shall be decreed, the court may "take order"—make some direction—touching alimony for the wife. Its action need not be final upon the subject. It will deal with the conditions then existing and allow and fix the alimony or reserve the question pending future changes in circumstances. In providing that the personal estate and rents of the realty of the husband may be applied to "such maintenance and allowance as to the said court shall from time to time seem reasonable and just," the statute exhibits an intention that the subject shall be continuously dealt with according to the varying conditions and circumstances of the parties

(Richmond *vs.* Richmond, 1 Gr. Ch., 90; Calame *vs.* Calame, 10 C. E. Gr., 548, 551).

The reason of such legislative purpose is obvious. Consummated marriage carries with it rights and duties which, so far as a true and faithful wife is concerned, can morally end only with the life of one of the parties. Her right to support and maintenance continues so long as it is just that she shall retain it. It is coextensive with the husband's position and ability.

His ability and the justice of her enjoyment of her right are subject to the change of circumstances which the court cannot anticipate, and hence complete justice requires that the court's power to act shall be kept open so long as it may be needed to direct just variation.

It is plainly the legislative contemplation that the subject
67 *52 of alimony is to be dealt with as an adjunct of the divorce suit and I cannot but deem it, at least, a question of grave doubt, whether, when the final decree in such a case, fails to treat of the question of alimony in any way, and more particularly when in a case like the present, where alimony is specially asked, it so fails, it will not be taken to have determined all matters involved in the suit and to have ruled adversely to the question of alimony, which it has not affirmatively responded to by allowance or reservation. I need not decide this question, its gravity is enough to satisfy me that the amendment sought will be of material value to the petitioner.

I am satisfied that the omission of the decree to reserve the question as to alimony was not a deliberate act of the petitioner's counsel based upon the exercise of his judgment, but was due to the inadvertence of that gentleman in drafting the decree. The evidence in the cause makes a *prima facie* case for the allowance of alimony, to be limited in amount by the defendant's ability, and I perceive no ground upon which the court could or should have refused to reserve question as to the allowance if reservation had been asked when the decree was signed.

Respecting such an amendment the rule recognized by this court is, that while the court will not vary or alter an enrolled decree in a material point, without a bill of review or a rehearing, it will, upon petition, amend its enrolled decree when the amendment is necessary to give full expression to its judgment, and is matter which would, without doubt, have been incorporated in the decree when made if attention had been called to it.

68 *53 Dorsheimer *vs.* Rorback, 9 C. E. Gr., 33.
Farmon *vs.* Weswall, 9 C. E. Gr., 68.
Jones *vs.* Davenport, 18 Stew. Eq., 83.

I think that the amendment should be made in this case. The petitioner's delay in asking for it is not attributable to laches or to acquiescence in the decree as made. The proof is uncontradicted and satisfactory that she did not know of the deficiency in the decree until just before she made the present application. Her attention was then called to it, because the defendant's father had died,

and it was ascertained that he would take a valuable interest in the residuary estate, and she prepared to ask the court's assistance under the decree. It is true the defendant has married again. He represents this fact by an affidavit which fails to disclose the date of his remarriage. Whether the marriage took place before or after the present application does not definitely appear by admissible evidence. But I do not think that the fact of his remarriage changes the situation. It exhibits the defendant's acquiescence in the divorce. The matter of the amendment will not disturb the divorce. The decree will be amended without being opened, either by insertion of the matter in the decree itself, or by a supplemental order.

ALEX. T. McGILL, *C.*

A true copy.
L. A. THOMPSON, *Clerk.*

69 *54 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

On Petition and Affidavits, etc.
Order Amending Decree.

Upon opening the matter to the court by James Westervelt, solicitor of the petitioner, in the presence of J. Herbert Potts, Esq., solicitor of the defendant, and due proof being made of the service of the order to show cause heretofore granted herein, and the petition and affidavits submitted on behalf of the petitioner and the affidavits submitted on behalf of the defendant having been read, and the arguments of the respective counsel having been heard and considered, and the court having duly considered the said petition, proofs and arguments, and it appearing to the court that the petitioner is entitled to the relief sought and prayed for by her in her petition, it is on this 26th day of October, 1896, ordered that the final decree heretofore made herein on the 7th day of August, 1893, and filed in the office of the clerk on the 8th day of August, 1893, be and the same hereby is amended by inserting, before the last paragraph of the said decree, and after the words "obligation thereof," the words following, to wit:

"And it is further ordered, adjudged and decreed that the
70 *55 said petitioner, Mary W. Lynde, shall have the right to apply to this court at any time hereafter, at the foot of this decree, for reasonable alimony, and for such other relief in the premises touching alimony as may be equitable and just, and this court reserves the power to make such order or decree as may be necessary to allow and compel the payment of alimony to the petitioner by defendant, or to refuse to allow alimony.

ALEX. T. McGILL, *C.*

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.
} On Petition. Notice of Appeal.

A true copy.
L. A. THOMPSON, *Clerk.*"

The defendant hereby appeals from the whole and every part of an order amending the final decree made in this cause, and filed in this court on the twenty-eighth day of October, eighteen hundred and ninety-six, to the court of errors and appeals in the last resort in all causes.

Dated November 6, 1896.

J. HERBERT POTTS,
Solicitor of Defendant.

71 *56 I conceive there is good cause for appeal in the above-stated cause.

CHARLES C. BLACK,
Of Counsel with Defendant.

A true copy.
L. A. THOMPSON, *Clerk.*

New Jersey Court of Errors and Appeals.

Between—

CHARLES W. LYNDE, Appellant,
and
MARY W. LYNDE, Respondent.
} Petition of Appeal.

To the honorable the court of errors and appeals in the last resort in all causes:

The humble petition of Charles W. Lynde, appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the court of chancery by his honor, Alexander T. McGill, chancellor of New Jersey, bearing date the twenty-sixth day of October, eighteen hundred and ninety-six, and filed on the twenty-eighth day of October, eighteen hundred
72 *57 and ninety-six, wherein the said Mary W. Lynde was petitioner, and the said Charles W. Lynde was defendant, in this respect, to wit: that the said order adjudges that the final decree heretofore made on the seventh day of August, eighteen hundred and ninety-three, be amended by inserting before the last paragraph of the said decree and after the words "obligation thereof" the words following, to wit:

"And it is further ordered, adjudged and decreed that the said petitioner, Mary W. Lynde, shall have the right to apply to this court at any time hereafter, at the foot of this decree, for reasonable

alimony, and for such other relief in the premises touching alimony as may be equitable and just, and this court reserves the power to make such order or decree as may be necessary to allow and compel the payment of alimony to the petitioner by defendant, or to refuse to allow alimony."

And your petitioner humbly appeals from the said order of the chancellor amending the final decree, as aforesaid, in the above-entitled cause, upon the ground that the same is erroneous, for that—

First. Alimony cannot be decreed after final decree duly enrolled against a defendant who was not served with process for appearance and did not appear in the original cause, and had no property within the control of the court.

Second. And further, that alimony cannot be granted after a final decree duly enrolled which was silent — to it.

Third. That the court has no power to amend its decree in that particular.

73 *58 Your petitioner therefore prays that the said order amending said decree of the said chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

J. HERBERT POTTS,
Solicitor of Appellant.
CHAS. C. BLACK,
Of Counsel with Appellant.

Endorsed: Filed Nov. 17, 1896. Henry C. Kelsey, clerk.

NOTE.—The foregoing papers, pages 16–73 inclusive, form the case on appeal in the cause in New Jersey.

The endorsement, which was omitted on page 16, is as follows: "New Jersey court of errors and appeals. Between Charles W. Lynde, appellant, and Mary W. Lynde, respondent. Case on appeal. J. Herbert Potts, Charles C. Black, for appellant. James Westervelt, George H. Bruce, for respondent."

74 EXHIBIT "B."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

It is hereby stipulated by and between the solicitors for both parties herein that the argument for petitioner's motion to vacate the enrollment, open the decree, &c., be further adjourned to the

9th day of March, 1898, at eleven o'clock in the forenoon, at the same place.

JAMES WESTERVELT,
Sol'r for Petitioner.
J. HERBERT POTTS,
Sol'r for Def't.

The above argument is hereby further adjourned to the 13th day of March, 1898, at 11.00 o'clock in the forenoon, at chancery chambers, Jersey City.

JAMES WESTERVELT,
Sol'r for Petitioner.

75 EXHIBIT "C."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

It is hereby stipulated by and between the solicitors for both parties hereto, that the argument of the petitioner's motion to vacate the enrollment, open the decree, etc., be further adjourned to the 22d day of March, 1898, at eleven o'clock in the forenoon, at the chancery chambers, Jersey City.

Dated March 9th, 1898.

JAMES WESTERVELT,
Sol'r for Pet'r.
J. HERBERT POTTS,
Sol'r for Defendant.

Above argument further adjourned by consent to April 6, 1898, eleven a. m., same place.

JAMES WESTERVELT,
Sol'r for Pet'r.
CHAS. H. VOORHIS,
Of Counsel with Def't.

76 EXHIBIT "D."

In Chancery *in* New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.
} On Petition, &c. Affidavit.

STATE OF NEW JERSEY, *County of Hudson,* } *ss.:*

Charles W. Lynde, being duly sworn according to law, on his oath saith: That he resides in the State of New York; that this de-

fendant was by the decree of this court divorced from the said petitioner from the bond of matrimony, upon her petition, on the seventh day of August, eighteen hundred and ninety-three, and that since that time he has been married again to another woman, with whom he is now living as husband and wife at his home at Patchogue, Long Island, New York.

Deponent further says that the said petitioner, as he is informed and believes, owns and possesses an interest in real estate situated in the city of Trenton, New Jersey, in a part of which she now resides. That he is informed and believes that the decree for divorce in said cause was purposely drawn without providing for or reserving any alimony, for the reason that the petitioner was intent upon procuring a divorce and not alimony, and this defendant was well known to the said petitioner and her counsel in said cause to be unable to pay any alimony. Deponent is informed that
77 upon inspection of the said decree it appears that the same was drawn in the handwriting of her counsel, James S. Aitken, Esquire.

Deponent further says that he is financially unable to pay alimony to the said petitioner, and that he is advised by counsel and believes that the said decree having been made without reserving the question of alimony, and this defendant having been absolutely divorced from said petitioner by said decree, and having since formed new relations and matrimonial obligations, that it would be illegal, inequitable and unjust to now impose upon him the burden of alimony, so long after the granting of said absolute decree dissolving his first matrimonial relations absolutely without terms.

CHAS W. LYNDE.

Sworn to and subscribed before me this 27th day of March, 1896, at Jersey City.

W. B. GILMORE,
Master in Chancery of New Jersey.

78 EXHIBIT "D."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition, &c. Affidavit.

STATE OF NEW YORK,
City and County of New York, } *ss:*

Rollin H. Lynde, being duly sworn, according to law, on his oath, saith: That he is the brother of the defendant above named and is fully informed as to the affairs of the estate of his deceased father, Charles R. Lynde. That under the will of the said deceased, the said defendant has no interest whatever in any of the real

estate that belonged to the said deceased, Charles R. Lynde. That by the said will there are specific legacies amounting to nearly one hundred and fifteen thousand dollars in personalty and four hundred and fifty thousand dollars in real estate specifically devised, and that by the law of New York all these specific legacies must be paid in full before the residuary legatees can receive anything. That in the accounting referred to in the said affidavit of James Westervelt in this cause, it is directed that the balance of said estate be retained in the hands of the executor, subject to the surrogate's further order in the premises, for the purpose of being applied to the payment of the claims of Catherine L. Babcock, Charles L. Babcock, Augusta W. Smith, Edward H. Babcock and John
79 Oscar Ball, which claims are in litigation, and the said claimants maintain that their claims will exhaust all the personal estate and leave nothing for distribution to the residuary legatees.

Deponent further says that if said claimants succeed in maintaining their claims, actions on all of which have been begun in the supreme court of the State of New York, defendant will receive nothing from his father's estate.

Deponent further says that from the nature of said actions it is probable that many years must elapse before the actions can be finally determined, and that the expenses of such litigations will necessarily be very heavy.

Deponent further says that the statement that said defendant has inherited from his said father about five hundred and twenty-five thousand dollars is not true, and further that it is not true that said defendant has received or is about to receive as his share of the said estate in actual cash over five hundred thousand dollars, and that it is not true that he is now able to pay petitioner a large amount of alimony or any alimony, and further deponent saith not.

ROLLIN H. LYNDE.

Sworn to and subscribed before me, a notary public of the State of New York, this 27th day of March, 1896, at New York city.

DAVID SCOTT,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Form 4. 1636.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

I, Henry D. Purroy, clerk of the city and county of New
80 York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify, that David Scott has filed in the clerk's office of the county of New York, a certified copy of his appointment as notary public for the county of Kings with his autograph signature, and was, at the time of taking the annexed deposition, duly authorized to take the same. And that I am well acquainted with the handwriting of said notary

public and verily believe that the signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court and county, the 28th day of M'ch, 1896.

HENRY D. PURROY, *Clerk.*

A true copy.

L. A. THOMPSON, *Clerk.*

Endorsed: "In chancery of New Jersey. Between Mary W. Lynde, petitioner, and Charles W. Lynde, defendant. On petition, &c. Affidavits. J. Herbert Potts, solicitor of defendant. Filed April 6th, 1896."

81 EXHIBIT "E."

Court of Chancery of New Jersey, Chancellor's Chambers.

MARY W. LYNDE *vs.* CHARLES W. LYNDE. } On Petition to Amend Decree, &c. Memorandum.

Mr. James Westervelt, 58 Wall street, N. Y., for petitioner.
Mr. J. Herbert Potts and Mr. C. H. Voorhis, for the defendant.

The CHANCELLOR:

It is asserted, on behalf of the petitioner, that the decree in this case failed to include any provision for alimony because of the neglect of the petitioner's solicitor, who did not carry out the petitioner's instructions in that behalf, and, upon the other side, it is alleged that the failure to ask for alimony, when the decree was taken, was the deliberate act of both the petitioner and her counsel, with intent to give up alimony in order to facilitate them in obtaining a decree for divorce.

I think that the exact state of fact should be definitely ascertained by taking affidavits, and I will, therefore, direct the taking of affidavits upon this issue upon two days' notice and direct that they be presented on the 20th instant at the Jersey City chambers. Both the petitioner and her former counsel should be examined and cross-examined.

(Dictated.)

82 EXHIBIT "F."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner, and CHARLES W. LYNDE, Defendant. } On Petition, &c. Notice.

SIR: Please take notice that the depositions of witnesses will be taken under the order of the chancellor lately made in the above-entitled cause on behalf of the defendant, at the office of Judge

Chauncy Beasley, 145 East State street, Trenton, New Jersey, on Wednesday, April twenty-ninth, eighteen hundred and ninety-six, at four p. m., before Rutherford Coleman, Esquire, one of the master- and examiners of the above court.

Your obedient servant, J. HERBERT POTTS.

To James Westervelt, Esquire, solicitor of petitioner.

Endorsed: "In chancery of New Jersey. Between Mary W. Lynde, petitioner, and Charles W. Lynde, defendant. On petition, &c. Notice. J. Herbert Potts, sol'r of def't. Copy."

83 EXHIBIT "G."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner, and CHARLES W. LYNDE, Defendant. } On Petition, &c. Notice.

SIR: Please take notice that the depositions of witnesses will be taken under the order of the chancellor lately made in the above-entitled cause on behalf of the defendant, at the office of J. Herbert Potts, one Montgomery street, Jersey City, New Jersey, on Friday, May first, eighteen hundred and ninety-six, at four p. m., before William G. E. See, Esquire, one of the masters and examiners of the above court.

Yours, J. HERBERT POTTS.

To James Westervelt, Esquire, solicitor of petitioner.

Endorsed: "In chancery of New Jersey. Between Mary W. Lynde, petitioner, and Charles W. Lynde, defendant. On petition, &c. Notice. J. Herbert Potts, sol'r of def't. Copy."

84 EXHIBIT "H."

New Jersey Court of Errors and Appeals.

Between—

CHARLES W. LYNDE, Appellant, and MARY W. LYNDE, Respondent. } Notice of Argument.

SIR: Take notice that the argument of the appeal in the above cause will be brought on at the next term of the court of errors and appeals, to be held at the State court-house, at Trenton, on Tuesday, the second day of March, eighteen hundred and ninety-seven, at eleven o'clock a. m., or as soon thereafter as counsel can be heard.

J. HERBERT POTTS,
Sol'r of Appellant.
CHAS. C. BLACK, *Of Counsel.*

To James Westervelt, Esq., sol'r of respondent.

Dated February 8, 1897.

85 Endorsed: "N. J. court of errors and appeals. Between Charles W. Lynde, appellant, and Mary W. Lynde, respondent. Notice of argument. J. Herbert Potts, Charles C. Black, sol'r-, &c., of counsel — appellant. Filed Feb'y 13, 1897. Henry C. Kelsey, clerk."

EXHIBIT "K."

N. J. Court of Errors & Appeals.

Between—

CHARLES W. LYNDE, Appellant,
and
MARY W. LYNDE, Respondent.

This cause having been brought to a hearing on an appeal from the court of chancery at the last March term of this court, and the same having been submitted on printed briefs on behalf of
86 both parties, and the questions brought up by said appeal having been duly considered, it is, on this twenty-eighth day of June, 1897,

Ordered, adjudged and decreed that the order of the court of chancery, made on or about the 26th day of October, 1896, which is appealed from by the appellant, be and the same is hereby in all things affirmed with costs, to be paid by the appellant, and that the petition of appeal be dismissed.

And it is further ordered that the record to be remitted to the court of chancery to proceed further thereon according to law and the practice of said court.

On motion of James Westervelt, solicitor of respondent.

Endorsed: "Filed July 1, 1897. George Wurts, clerk."

EXHIBIT "L."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.
} On Petition and Affidavits, &c.

Please take notice that I shall apply to the chancellor of this State on Monday, the 2d day of November next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the
87 chancery chambers in Jersey City, for an order referring this matter to a master to ascertain and report whether alimony should be allowed to petitioner, and if so, how much; which motion is to be founded on the petition and affidavits filed herein on the 14th day of February, 1896, and on the affidavit of petitioner filed

herein April 6th, 1896, copies of which have been heretofore served on you, and on all subsequent proceedings heretofore had herein.

Dated October 27th, 1896.

Yours, &c., JAMES WESTERVELT,
Solicitor of Petitioner.

To J. Herbert Potts, Esq., solicitor of def't.

EXHIBIT "M."

In Chancery *in* New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

Upon opening this matter to the court by James Westervelt, solicitor of the petitioner, and it appearing that the above-named petitioner did heretofore, and on or about the 11th day of February, 1896, present to this court and file herein her petition, praying among other things that the enrollment of the decree filed in this cause, on the 8th day of August, 1893, should be vacated, and
88 the said decree should be opened, and amended by decreeing that reasonable alimony be paid to the said petitioner by the defendant, and that thereupon his honor, the chancellor of this State, made an order directing the said defendant to show cause why the prayer of the said petitioner should not be granted.

And it further appearing that thereafter the said petition and the affidavits annexed to and accompanying the same, together with the said order to show cause, were duly served upon the said defendant, and that upon the return day of said order to show cause, said defendant appeared before his honor, the said chancellor, by J. Herbert Potts, Esq., his solicitor, and opposed the prayer of the said petition.

And it further appearing that thereafter, on or about the 26th day of October, 1896, after hearing the arguments of counsel on both sides, and the proofs submitted on behalf of petitioner and defendant, and due consideration having been had, his honor, the said chancellor, made an order in the above-entitled cause, directing "that the final decree heretofore made herein on the 7th day of August, 1893, and filed in the office of the clerk on the 8th day of August, 1893, be and the same hereby is amended by inserting before the last paragraph of said decree and after the words "obligation thereof" the words following, to wit:

"And it is further ordered, adjudged, and decreed that the said petitioner, Mary W. Lynde, shall have the right to apply to this court at any time hereafter, at the foot of this decree, for reasonable alimony, and such other relief in the premises touching alimony as may be equitable and just, and this court reserves the power to make such order or decree as may be necessary to allow and compel the payment of alimony to petitioner by defendant, or to refuse to allow alimony."

And due notice of this motion for an order of reference,
89 etc., having been served on the solicitor of the defendant, and after hearing the argument of James Westervelt, Esq., solicitor of the petitioner, for the motion, and due consideration having been had, and it appearing that the defendant between date of service of notice of this motion and argument thereof appealed from the aforesaid order filed herein on the 28th day of October, 1896, and that the said defendant has brought on his said appeal for hearing at the March term of the court of errors and appeals now last past, and the said court of errors and appeals having in all respects affirmed said order of Oct. 28th, 1896, it is thereupon

Ordered upon this twelfth day of July, 1897, that the above-entitled cause be, and it hereby is referred to Washington B. Williams, one of the special masters of this court, to ascertain and report whether alimony should be allowed to the petitioner, and if so, how much, and that the petitioner proceed to take depositions and other evidence before said special master to substantiate and prove the allegations contained in the aforesaid petition, and bring on the hearing of the cause upon notice to the said defendant; that the said master do return, together with his report, and as part thereof, such depositions and other evidence as may be taken before him in pursuance of this order on behalf of either or both of the parties to this cause,

And it is further ordered that the said hearing before said special master proceed until the same is finished.

Respectfully advised,

FREDERICK W. STEVENS, *V. C.*

By the statute.

H. C. PITNEY, *Master.*

90 EXHIBIT "N."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition in said Cause for Alimony. Master's Report.

In pursuance of an order of reference made on the above-stated petition on the twelfth day of July last, referring it to me to ascertain and report whether alimony should be allowed to the petitioner, and if so, how much, and directing the petitioner to proceed to take depositions and other evidence before me, and that the same should be returned with my report,

I do hereby respectfully report to the chancellor that I have been attended by James Westervelt, Esq., solicitor of the petitioner, and that the defendant has been summoned to attend this reference as appears by the summons and affidavit of service hereto annexed, and that at the time and place named in said summons the annexed deposition of the petitioner, Mary W. Lynde, was taken before me

in presence of her said solicitor, no one appearing for the said defendant, and that the said hearing was thereupon adjourned unto the twenty-ninth day of July, then instant, at 3 o'clock p. m., at the same place, when and where it was continued in presence of the same solicitor, no one appearing for the defendant, and further proofs and the deposition of John O. Ball, hereto annexed, were taken before me.

91 And that afterwards a certain commission issued in this cause to take the testimony of Frederick T. Aldridge, a witness residing in Brooklyn, in the State of New York, bearing date the twenty-seventh day of September last, with the interrogatories and return under the same as the same are duly filed in the office of the clerk of this court, were produced before me and read as evidence upon said reference.

And that I have examined the said proofs, exhibits and evidence, and heard the argument of counsel for the petitioner, and have duly considered the matters so referred to me.

And I report that it appears by the record of this suit that a divorce has been granted to the petitioner against the said defendant for the cause of desertion, by decree heretofore made in this cause, on or about the seventh day of August, in the year eighteen hundred and ninety-three, and that the said decree is still in force, and upon petition of the said petitioner presented to this court on or about the eleventh day of February, eighteen hundred and ninety-six, was amended, by inserting therein leave to the said petitioner to apply at the foot of said decree for alimony and reserving power to make such order or decree as might be necessary as to alimony; and the said petitioner, having thereupon applied for and obtained the order of reference first above mentioned, and the said prayer touching the allowance of alimony having been first made in the said petition presented on the eleventh day of February, A. D. 1896;

And it further appearing upon the proofs on this reference that the petitioner is without other means of support than her own labor, from which she has been and is earning about ten dollars a week, and that there are no surviving children of said marriage; and that she resides with her father and is thirty-two years of age; and that she received at her marriage from her father the sum of one thousand dollars, which was expended while she was

92 living with her said husband, and that she has no further expectation from her father's estate except as one of his ten children in the inheritance of his dwelling-house at Trenton;

And it further appearing on the said proofs, that when the petitioner was married to the defendant in the year 1884 he was without means of his own, except such allowance as he received from his father, and his own exertions; and that after the time of her desertion by him, which was in the year eighteen hundred and eighty-seven, she has received nothing from her said husband;

And it further appearing from the said proofs, that Charles R. Lynde, the father of the said defendant, died in the year eighteen hundred and ninety-four, leaving a large estate, and a last will and

testament which was admitted to probate in September of that year before the surrogate for the county of Kings, in the State of New York, and letters testamentary duly issued to the Long Island Loan and Trust Company of Brooklyn, in said State, the executor named in the said will; and that the said defendant, Charles W. Lynde, as one of the residuary legatees in said will became entitled to and has received from the said executor his share as such legatee in said estate, except a sum reserved by order of said surrogate for the purposes of certain litigations yet undetermined; and that the amount so received by the said defendant, exclusive of said reserved fund, amounts to over the sum of five hundred and four thousand dollars ($504,000) and produces an income exceeding twenty thousand dollars a year:

I thereupon report that alimony should be allowed to the petitioner in the amount of eighty dollars ($80) for each and every week, commencing on Tuesday, the eleventh day of February, in the year eighteen hundred and ninety-six, and that the arrears of said alimony so fixed should be due and payable in one sum
93 for the period down to the Tuesday next preceding the date of the decree to be made upon this report forthwith upon the making and filing of such decree; and that such alimony from and after said last-mentioned date should be payable weekly on Tuesday of each week, at the rate aforesaid.

All of which is respectfully submitted this thirteenth day of December in the year eighteen hundred and ninety-seven (1897).

WASHINGTON B. WILLIAMS,
Master in Chancery.

EXHIBIT "O."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

Upon opening this matter to the court by James Westervelt, solicitor for the petitioner, and it appearing that this cause was heretofore and on the 12th day of July, 1897, duly referred by order to Washington B. Williams, Esq., one of the special masters of this court, to ascertain and report whether alimony should be allowed to the petitioner and if so how much, and said hearing having been brought on before said special master upon due notice to the
94 defendant, and said special master having accordingly filed his report dated the 13th day of December, 1897:

Now, on motion of James Westervelt, solicitor of the petitioner, and upon reading and filing said report and the depositions and other evidence thereto annexed, it is, on this fifteenth day of December, 1897, ordered that the aforesaid report of the said special master and all the several matters and things therein contained, do stand satisfied, approved and confirmed unless the defendant, hav-

ing notice thereof, shall within eight days after having such notice, show unto the court good cause to the contrary.

By the court:

L. A. THOMPSON, *Clk.*

EXHIBIT "P."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition. Final Decree.

This cause coming on to be heard before the court of chancery of the State of New Jersey, in the presence of James Westervelt, solicitor of the petitioner, and it appearing to the court that the said petitioner, on the eighteenth day of November, 1892, filed her petition in this cause to obtain a divorce from the bond of matrimony for the causes therein set forth; and that the said petition contained a prayer for alimony to be paid by the above-named defend-
95 ant to the said petitioner, and for other relief; and that thereafter such proceedings were had that on the seventh day of August, 1893, his honor, the chancellor, made a decree herein, divorcing the parties hereto from the bond of matrimony, and that said decree made no provision or direction touching alimony; and it further appearing to the court that the omission of the said decree to reserve the question as to alimony was not a deliberate act of the petitioner's then counsel, based upon the exercise of his judgment, but was due to his inadvertence in drafting said decree; and it further appearing to the court that thereafter the petitioner, on the eleventh day of February, 1896, filed in this cause her petition, setting forth, among other things, the facts hereinabove recited, and praying that the enrollment might be vacated and the said decree opened and amended by decreeing that reasonable alimony be decreed to be paid to the petitioner by the defendant, and for a writ of *ne exeat*, and for such other and further relief as might be equitable and just; whereupon the chancellor made an order directing that the defendant show cause on the twenty-fourth day of February, 1896, at the chancery chambers in Jersey City, why the prayer of said petitioner should not be granted, and that certified copies of said petition and order to show cause and also of the affidavits accompanying said petition be personally served on the defendant whether within or without the State, and prescribing the time for such service; and that, on the 19th day of February, 1896, certified copies of said petition, affidavits and order to show cause were personally served on the said defendant, in accordance with said order and the law and practice of this State;

And it further appearing to the court that the defendant appeared on the return of said order to show cause, by J. Herbert Potts, his solicitor, and opposed the application of petitioner, and

filed affidavits denying the facts alleged by petitioner in her petition and affidavits, and thereafter caused the testimony of other witnesses to be taken in his behalf; and that ereafter, in the presence of the solicitors for both parties, after aring the affidavits and other proofs offered on behalf of both rties, and the arguments of the respective counsel having been ard and considered, the chancellor, on the 26th day of October, 96, made an order herein amending the aforesaid decree of ugust 7th, 1893, by inserting before the last paragraph of the said cree, and after the words "obligation thereof" the words follow-g, to wit:

"And it is further ordered, adjudged and decreed that the said etitioner, Mary W. Lynde, shall have the right to apply to this urt at any time hereafter, at the foot of this decree, for reasonable imony, and for such other relief in the premises touching alimony may be equitable and just, and this court reserves the power to ake such order or decree as may be necessary to allow and compel e payment of alimony to the petitioner by defendant, or to refuse allow alimony;" and that said order was duly filed herein on ctober 28th, 1896;

And it further appearing to the court, that thereupon due notice f a motion to be made on behalf of petitioner herein pursuant to he said decree, as amended as aforesaid, and the petition and order o show cause aforesaid, was duly served upon the solicitor of de-endant for an order referring this cause to a master to ascertain nd report whether alimony should be allowed to petitioner, and f so, how much; and that defendant, between the date of service f notice of said motion and argument thereof, appealed from the aid last-mentioned order of the chancellor to the court of errors & ppeals, and that the said order was in all things affirmed by the aid court of errors & appeals, and that thereafter this court upon due notice to the defendant's solicitor made an order on the 97 twelfth day of July, 1897, referring this cause to Washington B. Williams, Esq., one of the special masters of this court, to ascertain and report whether alimony should be allowed to the petitioner, and if so how much, and to take and return, together with his report, the depositions and other evidence taken before him in pursuance thereof;

And the petitioner having brought on the hearing before the said special master upon due notice to the defendant, and the said special master having filed his report, dated the 13th day of December, 1897, together with the depositions and other evidence taken before him, and a rule *nisi* to confirm said report having been duly entered on the 15th instant, and duly served on defendant, and no exceptions thereto having been filed by defendant:

Whereupon, and upon reading the pleadings and proofs in this cause, and the said report of the said special master, from all of which it satisfactorily appears to the court that the petitioner has no property and has no means of support other than her own labor, and that there are no surviving children of the marriage of the parties to this cause; and that the petitioner has received nothing

from defendant since the time of her desertion by him in the year eighteen hundred and eighty-seven; that the defendant has received his share of the estate of his father, Charles R. Lynde, deceased; and that the share so received by the defendant amounts to over five hundred and four thousand dollars ($504,000), and produces an income exceeding twenty thousand dollars a year; and it appearing to the court, and the court being satisfied and adjudging that a money judgment *in personam* should be rendered against the defendant, and due notice having been served on the defendant
98 of the application for this decree, it is, on this twenty-eighth day of December, 1897, by his honor, Alexander T. McGill, chancellor of the State of New Jersey, by virtue of the power and authority of this court and of the acts of the legislature of this State in such case made and provided, on motion of James Westervelt, solicitor of petitioner,

Ordered, adjudged and decreed, that the petitioner is entitled to recover of the defendant, and that the defendant do pay to the petitioner, the sum of seven thousand eight hundred and forty dollars, for alimony, at the rate of eighty dollars per week from the eleventh day of February, 1896, to the date hereof, and that execution issue therefor according to the practice of this court, and that the said sum of $7,840.00 be and the same hereby is constituted a valid lien on defendant's real estate.

And it is further ordered, adjudged and decreed, that the defendant pay to the petitioner the sum of eighty dollars ($80.00) per week at the termination of each and every week from the date of this decree as and for permanent alimony and maintenance, and that said weekly payments shall bear interest from the dates when they severally fall due at the rate of six per centum per annum until paid, and that they shall severally be and become valid liens upon the defendant's real estate, and that execution may issue therefor *toties quoties* according to law and the practice of this court, and that the defendant give bond to the petitioner in the sum of ten thousand dollars ($10,000), to be approved as to form and security thereof by Washington B. Williams, Esq., one of the special masters of this court, to secure the payment of the several sums of money hereby directed to be paid.

And it is further ordered, adjudged and decreed that the defendant forthwith pay to the petitioner her costs of this suit to be
99 taxed, and a counsel fee of one thousand dollars ($1,000.00) and that execution issue therefor according to the practice of this court.

And it is further ordered, adjudged and decreed that upon the failure or default of the defendant to pay any of the said several foregoing sums of money, or to give bond in accordance herewith, within twenty days from the date of the entry of this decree, application may be made for an order that a writ of sequestration issue against the said defendant or for an order appointing a receiver of the real and personal property of the defendant, and enjoining the said defendant from assigning, transferring or otherwise disposing of the same, and providing for such other and further relief as may

seem equitable and just for the purpose of enforcing and compelling the payment of the said several sums of money, as they may be or become due and payable under the terms of this decree.

ALEX. T. McGILL, *C.*

Respectfully advised.

FREDERICK W. STEVENS, *V. C.*

100 EXHIBIT "Q."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

SIR: Please take notice that unless within twenty days you comply with the provisions of the decree herein, dated Dec. 28, 1897, a certified copy of which is herewith served upon you, by paying to the above-named petitioner the sum of $8,976.07, being the amount thereby decreed to be paid, including counsel fee and taxed costs, as shown on the certified copy of taxed bill of costs annexed thereto, which is also herewith served upon you, with legal interest from the said 28th day of December, 1897, and the further sum of $80 per week at the termination of each and every week from said date, and giving bond to the said petitioner in accordance with said decree, I shall apply to the chancellor of the State of New Jersey on Tuesday, the 8th day of February next, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, at chancery chambers, in the city of Newark, for an order directing that a writ of sequestration issue against you, and appointing a receiver of your real and personal property, and enjoining you and your agents and attorneys from assigning, transferring or otherwise disposing of the same, and providing for such other and further relief as may

101 seem equitable and just for the purpose of enforcing and compelling the payment of the said several sums of money now due, or as they may be or become due and payable under the terms of the aforesaid decree.

Dated January 15, 1898.

JAMES WESTERVELT,
Solicitor for Petitioner.

To Charles W. Lynde, defendant.

NEW JERSEY, *ss:*

F. B. Biles, being duly sworn, on his oath says that on the thirty-first day of January, A. D. 1898, he set up the within summons in the office of the clerk of the court of chancery and that the same remained up for four entire days.

F. B. BILES.

Sworn and subscribed before me this 7th day of February, 1898.

A. M. LAFETRA,
Notary Public of N. J.

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

STATE OF NEW YORK, }
County of New York, } ss.:

James Westervelt, being duly sworn, on his oath says: That he is over the age of twenty-one years, and that on the 18th day
102 of January, 1898, at Blue Point, Long Island, in the State of New York, he served upon the above-named defendant, Charles W. Lynde, personally, a copy of the annexed notice of motion, together with a certified copy of the decree herein of December 28th, 1897, and a certified copy of the taxed bill of costs herein, as mentioned in said notice of motion, which is hereto annexed, by delivering said papers to said Charles W. Lynde personally at the aforesaid time and place and leaving the same with him, at the same time making a formal demand on him for compliance therewith, which defendant refused. Deponent further says that he knew the said Charles W. Lynde, so served, to be the individual mentioned and described in said notice as defendant herein.

JAMES WESTERVELT.

Subscribed and sworn to this 28th day of January, 1898, at New York, in the county of New York and State of New York, before me, who am a notary public in and for said county and State.

HENRY B. GAYLEY,
Notary Public, N. Y. Co.

103 EXHIBIT "R."

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition. Order.

Upon opening this matter to the court by James Westervelt, solicitor for the petitioner, and due proof being made by the affidavits filed of due service of notice of this application on the defendant, both personally and by setting up in the clerk's office, and this court having heretofore and on December 28th, 1897, made a decree herein directing the payment of certain sums therein mentioned by the defendant to the petitioner, as and for alimony, counsel fee and costs, by which decree it was, among other things, ordered, adjudged and decreed that the defendant give bond to the petitioner in the sum of ten thousand dollars, to be approved as to form and security thereof as therein directed, and also that upon the failure or default of the defendant to pay any of the sums mentioned in the said decree, or to give bond in accordance therewith, within twenty days

from the date of the entry thereof, application might be made for an order that a writ of sequestration issue against the defendant, or for an order appointing a receiver of the real and personal property of the defendant, and enjoining the said defendant from assigning, transferring, or otherwise disposing of the same, and providing for other relief such as might seem equitable and just;

104 And it appearing to the court by the affidavit of James Westervelt, dated and filed herein the 8th day of February, 1898, that a certified copy of the said decree was personally served on the defendant, Charles W. Lynde, more than twenty days since, and that the defendant refused to comply with the directions of the said decree, and still refuses, and it appearing that the said defendant has not given bond in accordance with the provisions of the said decree, and has not paid to the petitioner or her said solicitor any of the sums of money directed by the said decree to be paid, although amply able so to do, and it further appearing by the affidavit of James Westervelt, sworn to the 14th of February, 1898, and filed herein, that the defendant is the owner of certain stocks and bonds in New Jersey corporations hereinafter enumerated, it is, therefore, on this 8th day of February, 1898, by his honor, Alexander T. McGill, chancellor of the State of New Jersey, by virtue of the power and authority of this court, and of the acts of the legislature of this State, in such cases made and provided, on motion of James Westervelt, solicitor of petitioner,

Ordered that Charles L. Carrick, Esq., be and he hereby is appointed receiver of all the real and personal property in the State of New Jersey of Charles W. Lynde, the defendant in this cause, with full power to demand, sue for, collect, recover and receive, and take into his possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, bonds, stocks and property of any and every description in said State belonging to the said Charles W. Lynde, the defendant, and out of the income arising therefrom, or from the sales thereof, so far as necessary, to pay to Mary W. Lynde, the petitioner in this cause, the sum of seven thousand eight hundred and forty dollars, for alimony, due prior to and including

105 the 28th day of December, 1897, and the further sum of one thousand dollars as counsel fee, allowed to the petitioner by the aforesaid decree of Dec. 28, 1897, and the further sum of $136.07 for the petitioner's taxed costs herein, with interest on each of the said foregoing sums from the 28th day of December, 1897, together with her costs of making this application; and

It is further ordered that the said receiver do pay to the said petitioner the sum of eighty dollars per week from the 28th day of December, 1897, payable at the termination of each and every week from the said date, together with interest on each of said weekly payments at the rate of six per cent. per annum from the dates when they severally fall due, and that he retain sufficient of the securities coming into his hands as such receiver to pay from the income thereof to the said petitioner said weekly payments or sums of $80.00 per week at the termination of each and every week from

the 28th day of December, 1897, and that he continue to pay said sums of $80.00 to her weekly until the further order of this court; and it is further

Ordered that the said receiver hold any and all securities and other property belonging to the defendant which he shall obtain possession of, over and above what is sufficient to pay the aforesaid sums to the petitioner, subject to the further order of this court; and

It is further ordered that the said receiver give bond to the chancellor of this State in the sum of five thousand dollars, to be approved as to form and security by Washington B. Williams, Esq., conditioned for the faithful performance of his duties as such receiver; and

It is further ordered that an injunction issue herein directed against the said defendant, his servants, agents and attorneys, restraining the said defendant, his servants, agents and attor-
106 neys; from assigning, transferring or otherwise disposing of any of the following stocks and bonds in New Jersey corporations, to wit, 25 shares common stock of H. B. Claflin Co. 200 shares preferred stock of Herring Hall Marvin Safe Co. 600 shares preferred stock of the New York, Susquehanna & Western R. R. Co., 5, 4½ per cent. $1,000.00 bonds of the New York, Susquehanna & Western R. R. Co., or any other stocks and bonds of the said corporations, or either of them, now owned by the said defendant, Charles W. Lynde; and from assigning, transferring or otherwise disposing of any other real or personal property of the said defendant in the State of New Jersey to any person or corporation other than the said receiver and from in anywise interfering with the said receiver in the performance of his duties, or offering any obstruction or opposition to him therein, and from paying or assigning or transferring to any person or corporation other than the said receiver any sums due or to grow due to the defendant, as or for dividends upon stocks of the said corporations, or either of them, or as or for the several amounts due or to grow due upon any coupons attached to bonds of the said corporations, or either of them, now owned or possessed by the said Charles W. Lynde, defendant in this cause.

ALEX. T. McGILL, *C.*

Respectfully advised.
FREDERIC W. STEVENS, *V. C.*

107 Supreme Court, Suffolk County.

MARY W. LYNDE
against
CHARLES W. LYNDE.

The defendant for answer to the complaint in the above-entitled action:

First. Denies that he was guilty of any act or acts of cruelty to the plaintiff, or that he became intemperate, or that he deserted her, or failed to support her, and further he denies all the allega-

tions contained in paragraph nineteen of the complaint except that he admits that he had made no payment to the plaintiff upon the pretended judgment or decree therein set forth.

Second. Upon information and belief, defendant denies all the allegations contained in the twentieth paragraph of said complaint and he also denies that he has at any time or in any manner recognized said judgment or decree set forth in the complaint as valid.

Third. For a first, separate defence, defendant alleges that no process was served upon him in the action mentioned in the complaint nor was the defendant at the time when said action was commenced, or at any time thereafter, a resident of the State of New Jersey, and he alleges that the court making such pretended judgment or decree granting a divorce had no jurisdiction over this defendant.

108 For a second, separate defence, defendant alleges:

That he never appeared in person or by attorney in the said action referred to in said complaint, except specially to resist the plaintiff's motion to amend the judgment or decree therein also referred to in said complaint, and which said motion resulted in an order or decree amending the said judgment or decree in said action by adding thereto as follows:

"And it is further ordered, adjudged and decreed that the said petitioner, Mary W. Lynde, shall have the right to apply to this court at any time hereafter, at the foot of this decree, for reasonable alimony, and for such other relief in the premises touching alimony as may be equitable and just, and this court reserves the power to make such order or decree as may be necessary to allow and compel the payment of alimony to the petitioner by defendant, or to refuse to allow alimony." Nor did he in any manner authorize any other or further appearance; and that he was not thereafter either personally served with any notice or process in said action in the State of New Jersey, nor did he appear in any further or subsequent proceedings in said action, either in person or by attorney.

And for a third, separate defence, defendant alleges:

That at the time of the rendition of said judgment or decree of divorce referred to in said complaint, and for a long time prior and subsequent thereto, this defendant was without financial means, and on information and belief he alleges that there was no authority or power under the laws of the State of New Jersey or of the State of New York to award the alimony attempted to be granted the plaintiff.

109 That before any application to amend the alleged judgment or decree of divorce referred to in the complaint, this defendant became and ever since has been a resident of the State of New York.

Wherefore defendant demands that the complaint be dismissed with costs.

GEORGE S. INGRAHAM,
Attorney for Defendant.

Office and post-office address, No. 44 Court street, Brooklyn, N. Y.

STATE OF NEW YORK, } ss:
City of New York, County of Kings, }

Charles W. Lynde, being duly sworn, says: That he is the defendant above named; that the foregoing answer is true to his own knowledge except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHAS. W. LYNDE.

Sworn to before me this 1st day of July, 1898.

EDGAR BROWN,
Notary Public, Queens Co.

Certificate filed in Kings county.

110 *Decision.*

New York Supreme Court, Suffolk County.

MARY W. LYNDE, Plaintiff,
vs.
CHARLES W. LYNDE, Defendant.

This cause having been brought on for trial at a special term of this court, held at the county court-house at Riverhead, Suffolk county, New York, on the 5th day of November, 1898, before the Hon. Wilmot M. Smith, justice; James Westervelt, attorney, and Henry B. Gayley, of counsel, appearing for the plaintiff, and George S. Ingraham, attorney, and John H. Kemble, of counsel, appearing for the defendant; the parties hereto having presented their respective proofs, and the same having been duly considered, the court now decides concerning the issues raised by the pleadings herein, and the matters in controversy hereto, the following, viz.:

First. That the plaintiff is entitled to a judgment against the defendant enforcing against said defendant the decree of the court of chancery of New Jersey, dated December 28th, 1897, filed December 31st, 1897, in an action wherein Mary W. Lynde, the plaintiff in this action, was petitioner, and Charles W. Lynde, the defendant in this action, was defendant; and further enforcing against said defendant the order of said court of chancery of New Jersey in said action providing for the enforcement of the aforesaid decree
111 appointing a receiver of said defendant's property and enjoining defendant and his agents from assigning, transferring or otherwise disposing of said defendant's property, said order being dated March 24th, 1898, and filed March 29th, 1898, both with like force and effect as if the same were a judgment of this court.

Second. That the plaintiff is entitled to judgment decreeing that the defendant pay to the plaintiff or her attorney the sum of $8,976.07 alimony, counsel fee and costs due under said decree at the date thereof, together with the sum of $569.98 being interest thereon from said December 28th, 1897, and also that the defendant pay to the plaintiff, or her attorney, the further sum of $4,400.00, being

the amount of weekly alimony which has accrued since said decree, in accordance with the terms thereof, together with the sum of $138.60 interest thereon, in accordance with said decree, said two sums with interest aforesaid amounting in all to the sum of $14,084.65, together with the costs and disbursements of this action, to be taxed, and an extra allowance of $700.00, and that the plaintiff have execution therefor.

Third. That the plaintiff is entitled to a judgment decreeing that the defendant pay to the plaintiff, or her attorney, the sum of $80 per week at the termination of each and every week from the date of this decision as and for permanent alimony and maintenance, said weekly payments to bear interest from the date when they severally fall due at the rate of six per centum per annum until paid; that the plaintiff have execution for said sums; that the defendant within ten days from the service of the judgment entered on this decision, with notice of entry thereof upon him or his attorney, give to the plaintiff an undertaking with good and sufficient sureties to be approved by this court in the sum of $100,000, to secure the payment of the several sums of
112 money aforesaid; and that until the payment of the sums provided for in the second paragraph of this decision, and the execution and delivery of said undertaking, or until the transfer of defendant's property to a receiver as hereinafter provided, the defendant, his agents and attorneys, be enjoined and restrained from assigning, transferring or otherwise disposing of any of his property, real or personal.

Fourth. That the plaintiff is entitled to a judgment decreeing that if within ten days of the service of a copy of said judgment, with notice of entry, upon him or his attorney, said defendant fails to comply with the provisions of the second and third paragraphs of this decision, then and in that event a receiver be appointed ancillary to the receiver heretofore appointed by the court of chancery of New Jersey, as aforesaid, of the real and personal property of the defendant within the State of New York, or of so much thereof as will enable said receiver to pay to the plaintiff forthwith the sums of money mentioned in the second paragraph of this decision, and the income of the remainder of which will enable the receiver to pay to the plaintiff the sum of $80 per week, in accordance with the third paragraph of this decision, together with the receiver's expenses and commissions, further decreeing that out of the income of said property, or from the sales thereof, so far as necessary, said receiver pay to the plaintiff in this action or to her attorney the sums provided for in the second and third paragraphs of this decision, and further directing defendant and his agents to deliver to said receiver forthwith said amount of his real and personal property, and further decreeing that the defendant, his servants, agents and attorneys, be enjoined and restrained from assigning, transferring or otherwise disposing of any of his real or personal property so directed to be transferred to said receiver, to any person other than said receiver, and that the defendant,
113 his agents and attorneys and all other persons be further enjoined and restrained from in any way interfering with

the possession and title of said receiver, and from in anywise interfering with said receiver in the performance of his duties.

The grounds for this decision, concisely stated, are as follows:

I. That in 1884 the parties to this action were married in the State of New Jersey, and thereafter remained inhabitants of said State and lived together as husband and wife for more than three and one-half years.

II. That on or about the 18th day of November, 1892, the plaintiff, while still the wife of the defendant and a resident of the State of New Jersey, commenced a suit against defendant in the court of chancery of New Jersey, the same being a court of general equity jurisdiction, and filed a petition therein, alleging, among other things, that for more than two years then last past the said defendant had wilfully, continuedly and obstinately deserted the said plaintiff, and praying that the plaintiff might be divorced from said defendant, that reasonable alimony might be decreed to be paid to her by said defendant, and that plaintiff have such further and other relief as might be equitable and just.

III. That, as defendant could not be found within the State of New Jersey, the process which had been duly issued pursuant to said petition was duly served upon said defendant by publication.

IV. That by the laws of the State of New Jersey and the rules and practice of the said court, the said court had full power and jurisdiction, thereupon, and upon showing the proper facts to its satisfaction, to grant and make a decree of divorce in said
114 cause, and therein and thereby to reserve the question of alimony for decision upon a future application therefor; and that such is the usual course and practice of said court in such cases.

V. That thereafter such proceedings were had in said cause, that on or about the 7th day of August, 1893, a decree was duly made and entered by said court in said cause, wherein and whereby it was found among other things that the defendant had been guilty of wilful, continued and obstinate desertion of the plaintiff during the term of two years and more next before the exhibiting or filing of her said petition, and adjudged, among other things, that the parties to said suit, who are the parties to this action, be divorced from the bonds of matrimony for the cause aforesaid, and that each of them be freed and discharged from the obligations thereof.

VI. That, although the aforesaid petition specifically asked for alimony, and this plaintiff, the petitioner therein, repeatedly instructed her then solicitor to take the necessary measures to secure her right to alimony, yet through the inadvertence of her said solicitor, and without the knowledge of this plaintiff, the aforesaid decree was entered, making no provision touching alimony, or reserving the consideration and allowance thereof for hearing upon a future application to be made on her behalf.

VII. That thereafter and before the commencement of this action, defendant inherited from his father more than $500,000, of which sum defendant had been for about two years before the commencement of this action, and now is, in possession.

VIII. That at all the times mentioned herein, the plaintiff had not, and has not now, any means of support other than her own exertions.

115 IX. That on or about the 11th day of February, 1896, and after learning that defendant had inherited said money, this plaintiff duly made an application to said court of chancery by filing a petition and affidavit in the aforesaid cause, to open the aforesaid decree of divorce and amend the same by decreeing that reasonable alimony be paid to her by the defendant, and that she have such other and further relief as should be equitable and just, and thereupon the chancellor duly granted an order to show cause, directed to the defendant, why the prayer of the petitioner, this plaintiff, should not be granted with such further relief as should appear to be equitable and just. That the defendant in the meantime had become a resident of the State of New York, and the petition and order were personally served upon him in this State, that the defendant appeared generally to oppose the said application by his solicitor, J. Herbert Potts. That said Potts was duly authorized by said defendant to appear for him in manner and form as he did appear, and after hearing arguments and proofs submitted by both parties, the chancellor made an order amending the decree by adding the following: "And it is further ordered, adjudged and decreed that the said petitioner, Mary W. Lynde, shall have the right to apply to this court at any time hereafter at the foot of this decree, for reasonable alimony and such other relief in the premises touching alimony as may be equitable and just, and the court reserves the power to make such order or decree as may be necessary to allow and compel the payment of alimony to petitioner by defendant or to refuse to allow alimony." That from this order the defendant appealed to the New Jersey court of errors and appeals, and that said court affirmed the said order. That thereupon an order was duly made in said cause by the court of chancery afore-

116 said, referring the cause to a master to ascertain and report as to the amount of alimony, if any, to be allowed. This order of reference was based on all the previous proceedings in the cause and was obtained pursuant to notice to the defendant's said solicitor, Potts; and that the reference was proceeded with on notice to defendant's said solicitor. That thereafter, on a motion for a commission to examine certain witnesses in the State of New York, the defendant's said solicitor appeared before the chancellor in said court of chancery, and then stated that he was no longer solicitor for the defendant; and that in the subsequent proceedings in said cause, said solicitor did not appear, although he was duly notified. That such proceedings were thereafter had in said cause, that on or about December 28th, 1897, a decree was duly made therein, adjudging among other things that a money judgment *in personam* should be rendered against the said defendant, and that defendant pay to the petitioner, this plaintiff, the sum of $8,976.07 as and for alimony accrued to the date thereof, counsel fee and costs; that defendant pay to said petitioner the sum of $80.00 per week thereafter as and for alimony and maintenance and give bond to the petitioner to

secure the payment of the said several sums, and that upon the failure or default of the defendant to pay any of the said several sums of money, or to give bond in accordance with said decree within twenty days, then application might be made for an order directing, among other things, that a receiver of defendant's property be appointed and that the defendant be enjoined from assigning, transferring or otherwise disposing of his property, and for other relief to enforce compliance with said decree.

That copies of the master's report concerning alimony and a rule to *nisi* confirm the same, and also of the final decree made and entered pursuant thereto and notice of an application made in accordance with the terms of said decree for the appointment
117 of a receiver of defendant's property and for an injunction as aforesaid were all duly served on the defendant himself.

X. That defendant did not pay any of said sums of money nor give bond as directed in and by said decree, and accordingly on notice as aforesaid to defendant an order was duly made in said cause appointing a receiver of all the real and personal property of said defendant in the State of New Jersey, with full powers, and directing said receiver to pay to the plaintiff the several sums due and to grow due to her by the terms of the decree aforesaid, and directing that an injunction issue against the defendant, his servants, agents, and attorneys, restraining him and them from assigning, transferring, or disposing of any of certain stocks and bonds or any other property of defendant in the State of New Jersey, and from interfering in any way with said receiver. And that said decree and order directing the payment of alimony, counsel fee, and costs, and providing for its enforcement, are still in full force, unreversed, unrevoked, and unaltered.

XI. That said receiver has been unable to obtain possession of any property or assets of said defendant in the State of New Jersey; that defendant has not complied with the said decree in any respect; and that no part of any of the sums due or to grow due to the plaintiff from the defendant by virtue of said decree has been paid.

XII. That the prayer of the petition to amend the decree of divorce, on which all subsequent proceedings in said cause were based, was that said decree should be amended and alimony awarded, and for such other relief as should be equitable and just.

That in obedience to the order to show cause why the
118 prayer of the petition should not be granted, the defendant appeared generally and submitted to the jurisdiction of the court. That defendant did not object to the validity of the decree of divorce, but recognized its validity by remarrying. That upon the return of said order to show cause, defendant did not object to the jurisdiction of the court to entertain the application, but that he appealed to that jurisdiction to deny the said application upon the merits. That the said application was broad enough to include, not only the amendment of the decree of divorce, but also the proceedings to make the amendment effective, and that the jurisdiction which the court of chancery obtained over defendant could not thereafter be divested by the defendant. That the court of chan-

cery of New Jersey had jurisdiction of the subject-matter of said action and of the person of said defendant, and said court had power to make the said decree for alimony, costs, and counsel fee, and the said order to enforce said decree and make it effective, and that said decree and order are valid in the State of New Jersey and binding upon the defendant personally in said State.

Dated January 17th, 1899.

WILMOT M. SMITH, *J. S. C.*

119 *Judgment.*

At special term of the New York supreme court, Suffolk county, held at the county court-house, at Poughkeepsie, Dutchess county, on the 19th day of January, 1899.

Present: Hon. Wilmot M. Smith, justice.

MARY W. LYNDE, Plaintiff,
vs.
CHARLES W. LYNDE, Defendant.

The issues in this action having been tried at a special term of this court held at the county court-house at Riverhead, Suffolk county, New York, on the 5th day of November, 1898, by the Hon. Wilmot M. Smith, one of the justices of this court, and the said justice having duly made his decision herein, dated the 17th day of January, 1899, and duly filed, whereby judgment is directed in favor of the plaintiff and against the defendant for the relief demanded in the complaint, as by reference to said decision will more fully appear, together with costs and disbursements and an extra allowance of $700.00, which said costs and disbursements have been taxed at the sum of $111.38: Now, on motion of James Westervelt, attorney for the plaintiff,

It is adjudged and decreed that the decree of the court of chancery of New Jersey, dated December 28th, 1897, and filed December 31st, 1897, in the action in said court wherein Mary W.
120 Lynde, the plaintiff in this action, was petitioner, and Chas. W. Lynde, the defendant in this action, was defendant, and the order of said court of chancery of New Jersey in said action, dated March 24th, 1898, and filed March 29th, 1898, said order providing for the enforcement of the aforesaid decree by appointing a receiver of defendant's property and enjoining the defendant and his servants and agents from assigning, transferring or otherwise disposing of his property, both be enforced in this court in favor of the plaintiff and against the defendant with like force and effect as if the same were a judgment of this court.

It is further adjudged and decreed that the defendant within ten days from the service of a copy of this judgment, together with notice of entry thereof, on the defendant or his attorney, pay to the plaintiff or her attorney the sum of $8,976.07, being alimony, counsel fee and costs due under said decree of the court of chancery of New Jersey at the date thereof, together with the sum of $569.98,

being interest thereon from said December 28th, 1897, to the date of said decision; that the defendant pay to the plaintiff or her attorney the further sum of $4,400, being the amount of weekly alimony which has accrued since said decree in accordance with the terms thereof, together with the sum of $138.60 interest on the several instalments thereof in accordance with said decree, said two sums with interest as aforesaid amounting in all at the date of said decision to the sum of $1,084.65, with interest thereon from the date of said decision, and that the defendant pay to the plaintiff or her attorney the sum of $111.38, being the costs and disbursements of this action, and an extra allowance of $700, with interest on said costs and allowance from this date, and that the plaintiff have execution therefor.

It is further adjudged and decreed that the defendant pay to the plaintiff or her attorney the sum of $80 per week at the ter-
121 mination of each and every week from the date of said decision as and for permanent alimony and maintenance, said weekly payments to bear interest from the date when they severally fall due at the rate of six per centum per annum until paid; that the plaintiff have execution for said sums; that the defendant, within ten days from the service of a copy of this judgment, with notice of entry thereof, on the defendant or his attorney, execute and deliver to the plaintiff an undertaking with good and sufficient sureties to be approved by the court, in the sum of $100,000, to secure to the plaintiff the payment by the defendant of the said several sums of $80 per week aforesaid; and that until the payment of the said sums of $14,084.65 and interest, $111.38 costs and $700 allowance with interest as aforesaid, and until the execution and delivery of the undertaking aforesaid, or until the transfer of defendant's property to the receiver as hereinafter provided, the defendant, his agents and attorneys, be and the same hereby are enjoined and restrained from assigning, transferring or otherwise disposing of any of his property, real or personal, other than the income thereof.

It is further adjudged and decreed that if, within ten days from the service of a copy of this judgment with notice of entry thereof on the defendant, and on his attorney, said defendant fails to pay to the plaintiff said sums of $14,084.65 with interest, $111.38 costs and $700 allowance, with interest as aforesaid, or if within said ten days the defendant fails to execute and deliver to the plaintiff the above-mentioned undertaking, then and in that event W. Harmon Brown, Esq., counsellor-at-law of Brooklyn, New York, be and said W. Harmon Brown hereby is appointed a receiver, ancillary to the
receiver heretofore appointed by the court of chancery of New
122 Jersey as aforesaid, of the real and personal property of the defendant within the State of New York, or of so much thereof as will enable said receiver to pay to the plaintiff forthwith said sum of $14,084.65, $111.38 costs and $700 extra allowance as aforesaid, and the income of the remainder of which will enable the receiver to pay to the plaintiff said sum of $80 per week as above provided, together with said receiver's expenses and commissions,

with full power to said receiver to demand, sue for, collect and take into his possession said property; that said receiver give a bond in the sum of $25,000, to be approved by this court, conditioned for the faithful performance of his duties as such receiver; that said receiver have the power to employ counsel to advise him in the execution of his trust; that the defendant, his agents and attorneys forthwith assign, transfer and set over to said receiver said amount of his real and personal property, that said receiver have power to sell sufficient of said property to realize the aforesaid sums of $14,084.65, and $111.38 and $700 with interest together with expenses of said sale; that from the proceeds of said sale said receiver pay to the plaintiff or her attorney said sums of $14,084.65, $111.38 costs and $700 allowance with interest as aforesaid; that from the income of the remainder of said property said receiver retain sufficien- to pay his commissions and expenses and that out of the residue of said income he pay to the plaintiff or her attorney the sum of $80 per week payable at the expiration of each week from the said 17th day of January, 1899, together with interest on each of said weekly payments at the rate of six per cent. per annum from the date when they severally fall due; and that he continue to pay said sums of $80 to her weekly until the further order of this court; that said receiver hold any property of the defendant which he shall obtain possession of over what is sufficient to pay the
123 aforesaid sums subject to the order of this court; that the defendant, his servants, agents and attorneys be, and the same hereby are enjoined and restrained from assigning, transferring or otherwise disposing of any of his real and personal property so directed to be transferred to said receiver to any person other than said receiver; and that the defendant, his servants, agents and attorneys and all other persons be and the same hereby are enjoined and restrained from in anywise interfering with the title and possession of said receiver and from in anywise interfering with said receiver in the performance of his duties.

And it is further adjudged and decreed that either party to this action may at any time hereafter apply to the court at the foot of this judgment for any order or relief not inconsistent with this judgment.

And it is further ordered that all proceedings on the part of the plaintiff under this judgment other than perfecting the said judgment and serving a copy thereof on the defendant's attorney as hereinabove directed be stayed for twenty days from and after such service, and that the period of ten days hereinabove specified shall not begin to run until after the expiration of said stay.

Enter.

W. M. S.

124 New York Supreme Court, Suffolk County.

MARY W. LYNDE, Plaintiff,
vs.
CHARLES W. LYNDE, Defendant.

The defendant excepts to the findings of the trial justice dated January 17, 1899, as set forth as the grounds of the decision herein as follows:

I. To so much of finding number three as holds that "the process which had been duly issued pursuant to said petition was duly served upon said defendant by publication."

II. To the finding in the fourth of said grounds, "that by the laws of the State of New Jersey, and the rules and practice of the said court, the said court had full power and jurisdiction thereupon, and upon showing the proper facts to its satisfaction to grant and make a decree of divorce in said cause, and therein and thereby to reserve the question of alimony for decision upon a future application therefor; and that such is the usual course and practice of said court in such cases."

III. To so much of finding number five as holds that the decree of August 7th, 1893, therein referred to "was duly made and entered by said court in said cause."

IV. To so much of finding number nine as holds "this plaintiff duly made an application to said court of chancery, by filing a petition and affidavit in the aforesaid cause, to open the afore-
125 said decree of divorce and amend the same by decreeing that reasonable alimony be paid to her by the defendant, and that she have such other and further relief as should be equitable and just, and thereupon the chancellor duly granted an order to show cause."

And also so much of said finding as holds "that the defendant appeared generally to oppose the said application by his solicitor, J. Herbert Potts.

That said Potts was duly authorized by said defendant to appear for him in manner and form as he did appear."

And also so much of said finding as holds "that thereupon an order was duly made in said cause by the court of chancery aforesaid, referring the cause to a master to ascertain and report as to the amount of alimony, if any, to be allowed. This order of reference was based on all the previous proceedings in the cause and was obtained pursuant to notice to the defendant's said solicitor, Potts; and that the reference was proceeded with on notice to defendant's said solicitor."

And also so much of said finding as holds that the solicitor of defendant was duly notified of a motion for a commission to examine certain witnesses in the State of New York.

And also so much of said finding as holds "that such proceedings were thereafter had in said cause, that on or about December 28th, 1897, a decree was duly made therein, adjudging among other things that a money judgment *in personam* should be rendered against the said defendant, and that defendant pay to the peti-

tioner, this plaintiff, the sum of $8,976.07 as and for alimony accrued to the date thereof, counsel fee and costs; that defendant pay to said petitioner the sum of $80.00 per week thereafter as and for alimony and maintenance, and give bond to the petitioner to secure the payment of the said several sums; and that upon the failure or default of the defendant to pay any of the said
126 several sums of money, or to give bond in accordance with said decree within twenty days, then application might be made for an order directing, among other things, that a receiver of defendant's property be appointed and that the defendant be enjoined from assigning, transferring or otherwise disposing of his property, and for other relief to enforce compliance with said decree.

That copies of the master's report concerning alimony and a rule *nisi* to confirm the same, and also of the final decree made and entered pursuant thereto and notice of an application made in accordance with the terms of said decree for the appointment of a receiver of defendant's property and for an injunction as aforesaid were all duly served on the defendant himself." And especially to the word duly in each of said last two paragraphs.

V. To the tenth of said findings or grounds that "an order was duly made in said cause appointing a receiver of all the real and personal property of said defendant."

VI. And also to so much of the twelfth of said findings or grounds as hold "that in obedience to the order to show cause why the prayer of the petition should not be granted, the defendant appeared generally and submitted to the jurisdiction of the court. That defendant did not object to the validity of the decree of divorce, but recognized its validity by remarrying. That upon the return of said order to show cause defendant did not object to the jurisdiction of the court to entertain the application, but that he appealed to that jurisdiction to deny the said application upon the merits. That the said application was broad enough to include, not only the amendment of the decree of divorce, but also the proceedings to make the amendment effective, and that the jurisdiction which the court of chancery obtained over defendant could not there-
127 after be divested by the defendant. That the court of chancery of New Jersey had jurisdiction of the subject-matter of said action and of the person of said defendant, and said court had power to make the said decree for alimony, costs and counsel fee, and the said order to enforce said decree and make it effective, and that said decree and order are valid in the State of New Jersey and binding upon the defendant personally in said State.

And to each and every part thereof.

VIII. Defendant further excepts to the conclusions of law made by the trial justice as follows:

"First. That the plaintiff is entitled to a judgment against the defendant enforcing against said defendant the decree of the court of chancery of New Jersey, dated December 28th, 1897, filed December 31st, 1897, in an action wherein Mary W. Lynde, the plaintiff in this action, was petitioner, and Charles W. Lynde, the de-

fendant in this action, was defendant; and further enforcing against said defendant the order of said court of chancery of New Jersey in said action providing for the enforcement of the aforesaid decree, appointing a receiver of said defendant's property and enjoining defendant and his agents from assigning, transfering or otherwise disposing of said defendant's property, said order being dated March 24th, 1898, and filed March 29th, 1898, both with like force and effect as if the same were a judgment of this court."

And to each and every part thereof.

"Second. That the plaintiff is entitled to judgment decreeing that the defendant pay to the plaintiff or her attorney the sum of $8,976.07, alimony, counsel fee and costs due under said decree at the date thereof, together with the sum of $569.98, being interest thereon from said December 28th, 1897, and also that the defendant pay to the plaintiff or her attorney the further sum of $4,400.00,
128 being the amount of weekly alimony which has accrued since said decree, in accordance with the terms thereof, together with the sum of $138.60 interest thereon in accordance with said decree, said two sums with interest aforesaid amounting in all to the sum of $14,084.65, together with the costs and disbursements of this action, to be taxed, and an extra allowance of $700.00, and that the plaintiff have execution therefor."

And to each and every part thereof.

"Third. That the plaintiff is entitled to a judgment decreeing that the defendant pay to the plaintiff, or her attorney, the sum of $80 per week at the termination of each and every week from the date of this decision as and for permanent alimony and maintenance, said weekly payments to bear interest from the date when they severally fall due at the rate of six per centum per annum until paid; that the plaintiff have execution for said sums; that the defendant within ten days from the service of the judment entered on this decision, with notice of entry thereof, upon him or his attorney, give to the plaintiff an undertaking with good and sufficient sureties to be approved by this court in the sum of $100,000, to secure the payment of the several sums of money aforesaid; and that until the payment of the sums provided for in the second paragraph of this decision, and the execution and delivery of said undertaking, or until the transfer of defendant's property to a receiver as hereinafter provided, the defendant, his agents, and attorney, be enjoined and restrained from assigning, transferring or otherwise disposing of any of his property, real or personal."

And to each and every part thereof.

"Fourth. That the plaintiff is entitled to a judgment decreeing that if within ten days of the service of a copy of said judgment, with notice of entry, upon him or his attorney, said defendant fails to comply with the provisions of the second and
129 third paragraphs of this decision, then and in that event, a receiver be appointed ancillary to the receiver heretofore appointed by the court of chancery of New Jersey, as aforesaid, of the real and personal property of defendant within the State of New York, or of so much thereof as will enable said receiver to pay to

the plaintiff forthwith the sums of money mentioned in the second paragraph of this decision, and the income of the remainder of which will enable the receiver to pay to the plaintiff the sum of $80 per week in accordance with the third paragraph of this decision, together with the receiver's expenses and commissions, further decreeing that out of the income of said property or from the sales thereof, so far as necessary said receiver pay to the plaintiff in this action or to her attorney the sums provided for in the second and third paragraphs of this decision, and further directing defendant and his agents to deliver to said receiver forthwith said amount of his real and personal property, and further decreeing that the defendant, his servants, agents and attorneys be enjoined and restrained from assigning, transferring or otherwise disposing of any of his real or personal property so directed to be transferred to said receiver, to any person other than said receiver, and that the defendant, his agents and attorneys and all other persons be further enjoined and restrained from in any way interfering with the possession and title of said receiver, and from in anywise interfering with said receiver in the performance of his duties."

And to each and every part thereof.

IX. Defendant excepts to the decision in this action and to each and every part thereof.

GEORGE S. INGRAHAM,
Attorney for Defendant.

Office and post-office address, 44 Court street, Brooklyn, N. Y.

130 *Notice of Appeal.*

New York Supreme Court, Suffolk County.

MARY W. LYNDE
vs.
CHARLES W. LYNDE.

Please take notice that the defendant appeals to the appellate division of the supreme court, second judicial department, from the judgment entered in the office of the clerk of this court on the 21st day of January, 1899, in favor of the plaintiff and against defendant for the sum of $14,084.65, with interest thereon and also $811.38 costs with interest thereon, and from each and every part of said judgment.

Dated January 25th, 1899.

GEORGE S. INGRAHAM,
Attorney for Defendant, 44 Court Street, Brooklyn, N. Y.

To James Westervelt, Esq., att'y for plaintiff; county clerk of Suffolk county.

131 *Opinion.*

LYNDE
vs.
LYNDE.

The plaintiff obtained a decree of divorce against the defendant in the court of chancery of the State of New Jersey on the ground of desertion and non-support upon service upon the defendant by publication. The decree as granted contained no provision for alimony and no reservation of the right to apply for alimony thereafter. Subsequently the plaintiff made application to the court of chancery to open the decree and amend the same by decreeing that reasonable alimony be paid to her by the defendant, and that she have such other and further relief as should be equitable and just, and thereupon the chancellor granted an order to show cause, directed to the defendant, why the prayer of the petitioner should not be granted with such further relief as should appear to be equitable and just. The defendant in the meantime had become a resident of the State of New York and the petition and order *was* served upon him in this State. The defendant appeared generally to oppose the application by his solicitor, J. Herbert Potts, and after hearing arguments and proofs submitted by both parties, the chancellor made an order amending the decree by adding the following: "And it is further ordered, adjudged and decreed that the said petitioner, Mary W. Lynde, shall have the right to apply to this court at any time hereafter at the foot of this decree for reasonable alimony and such other relief in the premises touching alimony as may be equitable and just, and the court reserve the power
132 to make such order or decree as may be necessary to allow and compel the payment of alimony to petitioner by defendant or to refuse to allow alimony." From this order the defendant appealed to the court of errors and appeals, which affirmed the order; thereupon an order was made referring the cause to a master to ascertain and report as to the amount of alimony, if any, to be allowed. This order was based on all the previous proceedings in the matter. The reference was proceeded with on notice to defendant's solicitor. On a motion for a commission to examine certain witnesses in the State of New York, the defendant's solicitor appeared before the chancellor and then stated he was no longer solicitor for the defendant, and in the subsequent proceedings he did not appear, although duly notified. As a result of the proceedings a decree was made awarding alimony, costs and counsel fees to the plaintiff, and this action is brought to enforce such decree in the State of New York. The defendant claims that that part of the decree awarding alimony was not based upon personal service upon him or upon his appearance by a solicitor, and that it is not binding upon him personally in the State of New Jersey, and hence not enforceable in the State of New York. After a consideration of the case I am convinced that the court of chancery acquired jurisdiction to render a

personal judgment against the defendant and that such decree is enforceable in this State. The prayer of the petition on which all subsequent proceedings were based was that the decree should be amended and alimony awarded and for such other relief as should be equitable and just. In obedience to the order to show cause why the prayer of the petition should not be granted, the defendant appeared and submitted to the jurisdiction of the court. He did not object to the validity of the
133 original decree. He had recognized its validity by re-marrying. He did not object to the jurisdiction of the court to entertain the application. He appealed to its jurisdiction to deny the petition upon the merits. I think when the court once acquired jurisdiction over him upon the application of the plaintiff, that jurisdiction continued until the end of the proceeding and that the application was broad enough to include not only the amendment of the decree appealed from but proceedings to make the amendment effective. He submitted himself to the jurisdiction of the court for the purpose of securing an order favorable to himself. He was beaten. Having once availed himself of the jurisdiction of the court for his own benefit, he cannot divest the court of jurisdiction when the decision is adverse to his contention. Having once acquired jurisdiction on the application of the plaintiff, the jurisdiction continued to the end and the decree of the court of chancery that plaintiff have personal judgment against the defendant for costs, counsel fee and alimony is valid in the State of New Jersey and enforceable in the State of New York in this action.

The plaintiff is entitled to the relief demanded in her complaint, with costs.

134 Supreme Court, Suffolk County.

MARY W. LYNDE
vs.
CHARLES W. LYNDE.

Before Hon. Wilmot M. Smith, at special term.

NOVEMBER 5TH, 1898.

Appearances.

James Westervelt, Esq., attorney for plaintiff.
Henry B. Gayley, Esq., of counsel.
George S. Ingraham, Esq., for defendant.
John H. Kemble, Esq., of counsel.

PLAINTIFF'S ATTORNEY: I offer in evidence exemplified copy of the papers in the case Mary W. Lynde, petitioner, against Charles W. Lynde, defendant, chancery court of New Jersey. Endorsed: "Transcript of enrollment," containing what is called the enrollment of the decree, the order and the papers on which it was granted.

DEFENDANT'S ATTORNEY: I object to the offer of the papers down to and including what I shall term the original judgment for di-

vorce, upon the ground of want of jurisdiction of the court to render that judgment.

Overruled. Exception.

135 It appearing from the papers that the defendant was neither served personally within the State of New Jersey, or that he appeared therein, down to the time of that judgment—

I object to all the matter aside from the motion papers to amend the judgment by making a provision for alimony, upon the ground that they are irrelevant, and upon the further ground that the statements contained in them are not original evidences, and so inadmissible in this case.

I further object to the order permitting an amendment of the decree on the ground that the court had no jurisdiction, but I further object to the order fixing the amount of the alimony upon the ground that the order amending the decree was final in that proceeding, and the further application for alimony, and to fix the amount, on the ground that there was no appearance or any personal service of the defendant within the State of New Jersey and that, therefore, the court had no jurisdiction to render a judgment *in personam* against this defendant.

Objection overruled. Exception.

Received and marked Plaintiff's Ex. No. 1, Nov. 5, 1898, J. E. K.

It is stipulated that the court of chancery of New Jersey is a court of general jurisdiction, having full chancery and equity powers.

Plaintiff's attorney offers in evidence section 19 of the divorce act of New Jersey, printed in vol. 2 of the General Statutes of New Jersey, edition of 1895.

Also sections 1, 6, 19, and 39 of divorce act, rule 20, of the court of chancery of New Jersey.

DEFENDANT'S ATTORNEY: I object to it as immaterial and irrelevant, as it cannot of itself give jurisdiction.

Objection overruled. Exception.

136 GEORGE H. BRUCE, called as a witness for the plaintiff, and being duly sworn, says:

I am a lawyer and practice in this State and also in the State of New Jersey.

I have practised in the State of New Jersey since 1894.

I am a counsellor-at-law and master in chancery of that State. I have practised in the court of chancery of New Jersey very considerably, once a week perhaps for the last four years, having cases of all kinds. I am familiar with the practice of that court and its course of procedure.

I have read the decree in this cause sued on and have examined the record of the proceedings on which this case or decree, and the decree of December 28, granting alimony, were granted.

Q. State what, if anything, in your opinion, is the effect of the decree granting alimony in New Jersey.

Objected to. Overruled. Exception.

DEFENDANT'S ATTORNEY: I object to it as irrelevant, incompetent, and immaterial.

Overruled. Exception.

A. It has the full binding force and effect the decree would have to bind the defendant.

Q. And what is that effect?

A. The effect is to effect him *in personam*.

Cross-examination:

Q. You say that you have examined the roll and the decree in this action down to the judgment granting alimony in dollars and cents?

A. I was counsel for or with Mr. Westervelt in that case, that is one reason why I am familiar with it.

Q. You are one of the counsel in this action?

A. Yes, sir; in the New Jersey case, Lynde against Lynde.

Q. Now the common law prevails in the State of New
137 Jersey as modified by the statute?

A. Yes, sir.

Q. And then it was that alimony could only be recovered in New Jersey in an action for divorce?

A. Yes, sir.

Q. And then only when the party seeking the alimony is successful in the suit?

A. Certainly.

Q. Now if this cause reserving the question of alimony which was subsequently inserted in the judgment had originally been in that judgment under the law of New Jersey, could the plaintiff have recovered alimony in New Jersey against the defendant if he neither appeared or served within the State?

A. No, sir, he could not.

Q. Now as I understand you, you say that you have examined the record?

A. Yes, sir.

Q. Was not the effect of the order in the cause reserving the question of alimony and placing that clause in the original judgment, was not the result the same as though it had been in that judgment originally?

A. Yes, sir.

Q. Now when the plaintiff moved for alimony and for the insertion of the provision in the judgment for it, was not the order in the cause granting the motion to the extent that the court did in this action, of reserving the question for future consideration, was not that the final disposition of the plaintiff's application?

A. Why, certainly not.

Q. You have said that the court's order placing this amendment in the original decree was in effect the same as though it had originally been in that judgment?

A. Yes, sir.

Q. Now what more was there necessary, or was there in that order of the court that prevents it being a final disposition of the application?

A. Why the right to apply, at the foot of the decree.

Q. But you say that was in effect the same as though it had been in the original judgment?

A. Yes, sir.

138 Q. Do you mean to say that if that had been in the original judgment, that the plaintiff then could have proceeded against this defendant, whether he was personally served within the State or appeared therein?

A. No, sir, he could not; I have already answered that.

Q. So the fact upon which you base your opinion that this decree is effective in the State of New Jersey and would operate against the property of this defendant is upon the ground that the defendant appeared upon the application which resulted in this order amending the decree?

A. Yes, sir.

Q. You say that if the original judgment had contained this clause for alimony as amended, that no procedure for alimony could have been maintained against the defendant except he was served personally within the State of New Jersey or appeared therein?

A. Yes, sir.

Q. If he was personally served or appeared?

A. Yes, sir.

Q. Now then, as you have said that judgment as amended was in effect the same as though the amendment had originally been in the decree, how do you make it out that the court obtained jurisdiction of the defendant?

A. Why, I take it that that is a matter of evidence for the court.

Q. What particular evidence in the case do you consider makes that out?

Objected to; overruled; exception.

A. My answer to that would be that he has appeared in the case and thus given the court jurisdiction of it.

Q. If he did not appear after the order was made granting the judgment or amending the judgment by putting in this clause would the court have jurisdiction of him in person?

—. ——.

Q. You say that the court neither granted or refused alimony?

A. No, sir.

139 Q. I will read you part of the decree (reading); what is your answer to that?

A. My answer would be to that that if he appears immediately after this order was made, the motion to fix the amount of alimony would be entirely separate.

Q. And therefore he would have to be personally served within the State or continue to appear?

A. Yes, sir.

Q. Otherwise the court would not have power to render a judgment *in personam?*

A. No, sir.

Redirect:

Q. If the amendment took the effect, *nunc pro tunc*, would not the appearance to an application for alimony, made at any time after the making of the decree, bring the defendant within the jurisdiction of the court?

Objected to. Overruled. Exception.

A. Why certainly it would.

Q. So that upon the appearance of the defendant to show cause why the decree should not be opened and amended by decreeing that reasonable alimony, &c., should be paid her by the defendant, the court obtained jurisdiction to make final disposition of the prayer for alimony?

A. Yes, sir.

Recross-examination:

Q. You have said that if on this motion resulting in an order to amend the original decree, that if the defendant did not appear after that decree, and was not served within the State of New Jersey, that the court had no jurisdiction to render a judgment *in personam* against this defendant?

A. Yer, sir; I have said that.

Q. Now, you have been asked about the order being made
140 *nunc pro tunc*, do you mean that the consequence of the defendant appearing after that amendment—suppose he appears to resist the motion and the result of the motion is as I have stated, do you mean to say that the court by simply adding the words that it may be dated *nunc pro tunc* thereafter makes his appearance binding upon him for subsequent applications when it would not have been otherwise?

A. I mean to say that where this order is made *nunc pro tunc* and he appears in that action the court obtains jurisdiction.

Q. Do you mean if, he appears prior to that?

A. No, sir.

Q. Do you mean to say that if he appears subsequent to the order making it *nunc pro tunc?*

A. If he appears subsequent to the original decree.

Q. Do you mean to say that where the application is made, as in this action, for alimony, and the court makes an order that the decree be amended *nunc pro tunc*, do you mean to say that his appearance to resist that motion gives the court jurisdiction?

A. Yes, sir.

Q. And it is not necessary that he should appear thereafter to give the court jurisdiction?

A. No, sir.

Q. Is it in your opinion where the court says it neither grants or refuses alimony, but simply permits the plaintiff to apply, and the

defendant does not appear after that order is made, do you mean to say that the court then has jurisdiction?

A. The plaintiff must show when he makes the application for alimony that the defendant has been personally served or appears, and that is necessary to get the alimony.

Plaintiff rests.

141 J. HERBERT POTTS, called as a witness for the defendant and being duly sworn, says:

I reside and practice law in Jersey City, New Jersey.

I am an attorney and counsellor at law in courts of chancery and am familiar with the practice in chancery of that State and its rules.

Since 1874 I have practiced there; I was solicitor for Mr. Lynde in this action.

Q. Just state what was the first thing you did; when did the defendant come to you first?

A. I don't recall the date or time.

Q. Was it in respect to amending the judgment for alimony?

A. I can tell better by looking at the papers I have. This case was sent to me by some justice of the peace or lawyer from Patchogue with instructions to act in Mr. Lynde's behalf, look after his interests.

Objected to and asked to have the statement stricken out; granted; exception.

These papers were handed to me; I was in court presiding over the court at the time; as soon as court adjourned I went to the court of chancery.

PLAINTIFF'S COUNSEL: What do you expect to prove?

DEFENDANT'S ATTORNEY: I want to show that he did not appear on this application.

PLAINTIFF'S ATTORNEY: I object to the question on the ground that it is an attempt to prove facts affirmatively that *is* inconsistent with the allegations of the complaint, which allegations of the complaint have not been denied by the answer.

Objection overruled; exception.

This objection, ruling and exception apply to all questions put to this witness by defendant.

142 A. Yes, sir; it was in regard to that.

Q. Now did he give you any papers?

Same objection; same ruling; exception.

A. Yes, sir.

Q. Were they motion papers, were they the motion papers which resulted in the motion which resulted in the order amending the decree?

Same objection; same ruling; exception.

A. Yes, sir.

Q. After receiving these papers you appeared for the defendant, did you?

A. Yes, sir.

Q. And did you raise any question in court of jurisdiction?

A. No, sir; I did not do anything except ask for an adjournment; I knew nothing about the case.

Q. Did you upon the order raise any question as to the jurisdiction of the court?

A. Yes, sir.

Objected to on the ground that the record will show it. And also as incompetent and irrelevant.

On the ground that it is inadmissible to contradict the record of a judgment of a sister State, and it is not specifically set up in the pleadings.

Objection overruled; exception.

Q. And in what form did you raise that question?

Same objection; same ruling; exception.

A. On the ground that the defendant had never been served with process, and therefore alimony could not be granted for that purpose and on other grounds.

Q. Well, now we come down to the time when the chancellor made an order amending the decree, as it appears in this action, by providing that the court reserve the power to grant or
143 refuse alimony in the future, do you recollect that order being made?

A. Amending the final decree; yes, sir. I took an appeal from it.

Q. You took an appeal from that order?

A. Yes, sir.

Q. In the interim after this order amending the decree were you authorized to appear in any further litigation of the subject except to appeal from this order, that order?

Same objection; same ruling; exception.

A. I was not.

Q. Now, were there some papers served on you after the making of that order for the purpose of presenting to the court the question of granting or refusing alimony?

A. Yes, sir; a pile of papers were served on me.

Q. Did you see the plaintiff's counsel in that case or communicate with him on the subject?

A. I did. I saw him several times and told him that I had nothing to do with the case in reference to the alimony.

Q. You mean to say that after the order amending the decree you told him explicitly that you had nothing to do with any further proceedings in that case except to appeal from that order?

A. Yes, sir; and I told the chancellor to tell him so.

Q. Did that finally result in an order of the court that they proceed *ex parte?*

A. I don't know about that.

Q. Did you converse at all with the plaintiff's attorney, or appear in court in regard to any motion made to grant alimony, and fix its amount, did you appear in that matter or did you see the plaintiff's attorney shortly after the order amending the original decree?

A. My recollection of the matter is that I was in court of chancery, and the matter was called to the attention of Vice-Chancellor Stevens by Mr. Westervelt. I was in court on another matter,
144 and I stated to them that there had been an appeal taken to the court of errors and appeals, which acted as a stay, and that nothing could be done in that matter. I don't recollect now just what was done. I received a letter from the Vice-Chancellor Stevens that day stating that nothing could be done until that appeal was determined.

Q. You say that up to that time you had no authority from the defendant to appear except on that first application?

A. Yes, sir; in opposition to opening the decree.

Q. Did you receive this letter? Look at the envelope and state if you received that.

A. Yes, sir, at the date, at the time it bears date.

DEFENDANT'S ATTORNEY: I offer the letter in evidence.

PLAINTIFF'S ATTORNEY: I object to the letter being received in evidence, on the ground that it is entirely irrelevant, immaterial and incompetent, and that it seems to be a private communication from the defendant to his counsel, and has no binding effect upon the plaintiff. It does not bear upon the issues, in that there is no allegation in the answer that Mr. Potts, as solicitor for the defendant in the chancery proceeding in New Jersey, ever exceeded his authority in appearing in the action.

Objection overruled; exception.

Received and marked Defendant's Ex. No. 1, Nov. 5, 1898, J. E. K.

Q. Have you said in this action that you did not appear in this application for alimony and to fix the amount, after the chancellor's decision, except for the purpose of appealing from the order of the chancellor?

A. Yes, sir.

145 Q. Did you receive any authority from the defendant to appear at any time thereafter except as you did on the appeal?

A. No, sir.

Q. Now, after the court of errors and appeals had affirmed the order of the chancellor permitting the amendment of the decree, did the plaintiff then serve you with notice of motion or application for alimony?

A. Notice of motion for a reference.

Q. And what did you do?

A. I have both copies. I think I refused to have anything to do with it. I did not attend. About the same time Mr. Westervelt's application was made——

Objected to as not being responsive; overruled; exception.

Mr. Westervelt attempt- to take from the court of errors and appeals the $100 I had deposited there on appeal, and it was on this application to take this money that I called the chancellor's attention to the fact that Mr. Westervelt must not serve me with any papers in the matter, that he must serve Mr. Lynde.

Q. Now there had been a notice of motion similar to this one that was served on you right after the decision of the court of errors and appeals, which was served on you right after the chancellor's decision, was there not?

A. There was an order of reference, notice of motion for an order of reference.

Q. And that was shortly after the chancellor's decision?

A. Yes, sir.

Q. And in regard to that you simply claimed that the appeal operated as a stay, and was there anything done on that application on that notice from that day to this?

A. No, sir.

Q. And so there was a new notice served on you after the decision of the appeal to the court of errors and appeals?

146 Same objection, same ruling and exception.

A. Yes, sir.

Q. Now, Mr. Potts, in your practice in New Jersey, is there such a thing as special appearance?

A. I never heard of such a thing.

Q. I mean for special purposes?

A. I never heard of it in that State.

Q. Assuming that you did appear in that action, I ask your opinion as a lawyer, as a New Jersey lawyer, where when the order was made permitting the amendment, if you did not appear thereafter, would the court have jurisdiction to render a judgment *in personam?*

A. I should say not under the decision of the chancellor in this case.

Cross-examination:

Q. I understood you to say that you were retained by Mr. Lynde for the purpose of opposing this application for alimony, as set forth in the petition, and order to show cause, which was served on him shortly before that time, the first papers?

A. Yes, sir.

Q. You were not limited in your appearance, you were not limited by the defendant?

A. Not to my knowledge.

Q. Your object was to prevent the obtaining of alimony as asked in that petition?

A. My object was to prevent them opening the decree and the granting of alimony. My intention was to oppose their interfering in any way with the final decree, by putting in that clause.

Q. And your object was to prevent the obtaining of alimony, and you were retained by the defendant for that purpose?

A. I don't know what his intention was; I was to oppose any interfering with the final decree.

Q. And in your opposition to that you drew certain affidavits, did you not?

A. I don't remember; I think so.

147 Q. The affidavits that were submitted and filed you drew, did you not?

A. Either I did, or Judge Voorhees, or Charles Black. There were affidavits submitted.

Q. You don't mean to say that you made any special appearance at that time, for any special purpose?

A. I appeared in opposition to having the decree opened and amending it.

Q. Did you put on the record that you appeared specially?

A. I don't know; the papers will show.

Q. You also opposed the motion upon the ground of the defendant's estate?

A. I don't know; it is all in evidence.

DEFENDANT'S ATTORNEY: I will say that the judgment was also opposed by Mr. Potts on the ground that the judgment as previously drawn left out the alimony, and that his estate was not as was claimed by the plaintiff.

PLAINTIFF'S ATTORNEY: I offer in evidence exemplified copies of certain papers in the court of chancery (describing them).

DEFENDANT'S ATTORNEY: I don't see how that is material; everything in it is admitted.

Overruled. Exception.

Marked Ex. No. 2.

Q. You have said that you told me at some time or other that you were no longer solicitor for the defendant; do you know when you told me that; do you know when you first told me that?

A. No, sir.

Q. Do you know whether it will appear on the record?

A. I don't see how it could.

Q. You don't see how you could have taken your name off of the record?

A. No, sir.

Q. You don't know how you would proceed to take your name off of the record?

A. Get an order directing it.

148 Q. Did you do that?

A. No, sir.

Q. Did you ever before the decision of the court of errors and appeals tell me anything about a limited appearance or any desire to cease to be solicitor for the defendant?

A. I think so. I think this (showing paper) was in reference to the conversation about a reference to take testimony.

Q. Tell me the date of it.

A. This is a notice of motion returnable September 7th, 1897. I think I can refresh my memory some way by these papers.

Q. And it was then that you told me that you were no longer the solicitor of record for the defendant?

A. I did not say so, I think it was long before that.

Q. These are the papers to which you referred in your answer, notice of motion returnable September 7th, 1897?

A. Yes, sir.

Q. You took these papers out and said you could refresh your memory, and thought it was about this time?

A. No, sir; I have a lot of papers here, here are some more of them.

Q. Are you able to state when you told me that you were no longer solicitor of record for the defendant?

A. No, sir.

Q. And you never entered any order taking your name off of the record as solicitor?

A. No, sir.

Q. And so far as you have been at any time solicitor for the defendant, you still remain so, as far as the record in this case is concerned, do you not?

A. I said I was——

Q. Do you or do you not?

A. I remained solicitor for the defendant for the purpose of opposing the opening of the final decree and the granting of alimony.

Q. Can you refresh your memory sufficient to state when you did anything at all to show any attempt on your part to cease to be the solicitor for the defendant?

A. No, sir.

149 Q. I hand you a paper purporting to be a letter from you to myself, dated July 8th, 1897, asking you to look at the letter and state if you ever saw it before?

A. I have no recollection of it at all.

Q. That is your office letter-head?

A. It is.

Q. Do you recognize the signature to it?

A. It is not mine.

Q. Whose is it?

A. It is my clerk's.

Q. Was he authorized to send letters for you that you have dictated?

A. Yes, sir.

Letter offered in evidence and marked Exhibit 3.

Redirect:

Q. After looking at this letter, Exhibit 3, have you any recollection of it at all?

A. No, sir.

Q. It is not signed by you?

A. No, sir.

Q. It is signed by your clerk?

A. Yes, sir.

Q. Dictated probably?

A. Yes, sir.

Q. Did you see Mr. Westervelt after that?

A. I can't say, I have no recollection of the matter.

Q. Did you appear in court to oppose the motion, what did you do on that motion?

A. I would not be sure, but I think that was the time that Mr. Westervelt made the application to get the $100.

Q. You did not appear upon any matter respecting the allowing or disallowing of alimony and fixing the amount of it?

A. No, sir. I did not know until today how much had been allowed as alimony.

Q. Mr. Potts, you have in mind the order amending the decree so as to reserve the question of alimony whether it should be allowed or disallowed for future consideration?

A. Yes, sir.

Q. Now, in your opinion did the court thereby lose jurisdiction unless they personally served the defendant within the State
150 of New Jersey or he appeared therein thereafter on the application for alimony and to fix the amount of it?

Objected to; overruled; exception.

A. I think it gave them no jurisdiction, no additional jurisdiction.

Q. Suppose this judgment had remained as it was originally entered without reserving the question of alimony, is it your opinion that under the laws of New Jersey no alimony could have been granted until the decree was amended?

A. No, it could not.

Q. Therefore, in your judgment, it was essential that the decree should be amended, as it was, before it was in any position to apply for alimony thereafter?

A. Yes, sir.

Recross-examination:

Q. You mean by that, Mr. Potts, as I understand you, that the court of chancery obtained no additional jurisdiction over the defendant?

A. I think my understanding was that the opening of the decree in chancery and the amending of that decree put them in the same position as if it had been done or-ginally. That it did not, by the opening of that decree, give any additional jurisdiction, so far as service must be made upon the defendant or he must come in and appear.

DEFENDANT'S COUNSEL: I offer in evidence an order and the motion papers upon which it is made in Lynde *v.* Lynde in the court of chancery, New Jersey, exemplified copy, dated the 7th day of September, 1897, which denies the plaintiff's motion, with leave to renew the application therefor, upon personal service of notice thereof on the defendant within or without the State.

Objected to. Overruled. Exception.
Received and marked Defendant's Exhibit 2.

151 CHARLES W. LYNDE, called as a witness for the defendant, being duly sworn, says:

I am the defendant in this action. I left New Jersey in the winter of 1887. It may have been one way of January or the other. I ceased to be a resident of New Jersey at that time and have since been a resident of New York. I have been a resident of New York two years. I returned from Australia in 1894. That was also in the winter, either January or February.

Q. When the decree of divorce dissolving the marriage was obtained against you, where did you live or where were you?

A. I was in Australia.

Q. Did you hear of it before or after it was granted?

A. I heard of it after it had been decided.

It is admitted by plaintiff that defendant was a non-resident of New Jersey at and since the time of divorce.

Cross-examination:

Q. You have married some one else besides the plaintiff in this action?

A. Yes, sir.

Both sides rest. Case closed.

152 PLAINTIFF'S EXHIBIT 1.

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner, and CHARLES W. LYNDE, Defendant. } Petition for Divorce. James S. Aitken, Sol'r. Filed Nov. 18, 1892.

This petition is identical with that which appears on the opening pages of Exhibit "A" annexed to the complaint and printed hereinabove at pages 16 and 17. It is, therefore, not reprinted here by consent.

Order for Publication. Filed Dec. 24, 1892.

The petitioner having filed her bill in the above cause, and process of citation having been issued and returned according to law, and it bein- made to appear, by affidavit, that the defendant Charles W. Lynde resides out of the State of New Jersey, and that process could not be served upon him,

It is, on this twenty-fourth day of December, one thousand eight hundred and ninety-two, on motion of James S. Aitkin, solicitor of the petitioner, ordered, that the said absent defendant do appear and answer to the petitioner's petition on or before the twenty-fifth

day of February next, or that in default thereof, such decree be made against him as the chancellor shall think equitable and just. And it is further ordered, that the notice of this order prescribed by the rules of this court, shall, within twenty days hereafter,
153 be served personally on the said absent defendant by a delivery of a copy thereof to him or be published within the said twenty days in the State Gazette, a newspaper printed at Trenton, in this State, for four weeks, successively, at least once in every week, and in case of such publication that a copy thereof be also mailed, within the same time, to the said absent defendant, directed to his post-office address, if the same can be ascertained.

ALEX. T. McGILL, *C.*

Order of Reference. Filed March 14, 1893.

Upon opening this matter to the court, by James S. Aitkin, of counsel with the petitioner, and it appearing that due notice of the order of this court, made on the twenty-fourth day of December last past, directing the defendant to appear and answer the said petitioner's petition on or before the twenty-fifth day of February then next, has been duly published and mailed as in said order, and by the rules of this court, directed and prescribed; and that the said defendant has not answered to the same within the time limited by law and said order, but has wholly failed and neglected so to do,

It is thereupon, on this 14th day of March, A. D. eighteen hundred and ninety-three, ordered, that it be referred to Garret D. W. Vroom, one of the special masters of this court, to ascertain and report as to the truth of the allegations of the petitioner's petition, and his opinion thereon; and that the petitioner proceed to take depositions and other evidence before said special master, to substantiate and prove the allegations in said petition and to bring on the hearing of the cause *ex parte;* and that the said master
154 do return, together with his report, and as part thereof, such depositions and other evidence as may be taken before him in pursuance of this order.

ALEX. T. McGILL, *C.*

Master's Report. Filed May 17, 1893.

In pursuance of an order of this court, made in the above-stated cause, bearing date on the fourteenth day of March, in the year eighteen hundred and ninety-three, whereby it was referred to the subscriber, one of the special masters of this court, to ascertain and report as to the truth of the allegations of the petitioner's petition and his opinion thereon, &c., I do report that I have been attended by James S. Aitkin, Esq., solicitor of the said petitioner, and that in his presence I have taken the deposition of witnesses produced before me, and have examined into the matters thereby referred to me.

And I find and report, that the said petitioner and the defendant were lawfully married on the twenty-fifth day of March, eighteen

hundred and eighty-four, in the city of Trenton in this State; and that the petitioner have lived in the said city of Trenton in this State, for the period of nine years last past; that the petitioner and defendant lived together as husband and wife from the time of their marriage as aforesaid until the nineteenth day of December, eighteen hundred and eighty-seven, at which time both of said parties were residents of the said city of Trenton.

And I do further report, that on the nineteenth day of December, eight- hundred and eighty-seven, the said defendant deserted the petitioner and has never, since that time, returned to her, and that, in my opinion, the said desertion was and is wilful, continued and obstinate. All of which will more fully appear by the testi-
155 mony of the witnesses produced before me, whose depositions are annexed to this, my report.

And I further report, that I have endeavored to ascertain the facts and circumstances under which the said desertion took place, and the reasons which caused it. I am satisfied from the testimony that the desertion was caused by the dissipation of the defendant. Prior to the desertion, the defendant had treated the petitioner with great cruelty and evidently left her with the intention not to return. The defendant never supported the petitioner, nor did he at any time after their marriage provide her with any money nor did he provide anything for their children. The petitioner has been compelled to obtain her clothing and the necessaries of life by writing.

And I further report that I am of opinion that all the material facts charged in the petitioner's petition are true, and that a decree of divorce should be made in this cause for desertion pursuant to the prayer of said petition.

Respectfully submitted this thirteenth day of May, eighteen hundred and ninety-three.

G. D. W. VROOM,
Master in Chancery.

Rule for Hearing. Filed May 17, 1893.

On motion on behalf of James S. Aitkin, solicitor of the petitioner, it is, on this seventeenth day of May, A. D. eighteen hundred and ninety-three, ordered that the above-entitled cause be set down for hearing at the present (May) term of this court.

By the court:

ALLEN McDERMOTT, *Clerk.*

156 Here follows the decree of divorce, which is the same as that on pages *3 and *4 of Exhibit "A," and is printed hereinabove at pages 18 and 19. It is therefore omitted here by consent.

Order Substituting Solicitor, on Consent. Filed Jan. 30, 1896.

It appearing to the court by the annexed consent that the petitioner above named desires that James Westervelt be substituted as

her solicitor herein, and that James S. Aitkin, Esq., solicitor for the petitioner, is willing, and consents thereto,

It is, on this thirtieth day of January, 1896, ordered, that James Westervelt, Esq., be substituted as solicitor for the complainant in the above-stated cause in the place and stead of the said James S. Aitkin, Esq.

ALEX. T. McGILL, *C.*

We hereby consent to the entry of the foregoing order.

MARY W. LYNDE, *Petitioner.*
JAMES S. AITKIN,
Solicitor for Petitioner.

Here follow the petition, affidavits and order to show cause, which are a part of Exhibit "A," annexed to the complaint, and appear on pages *5 to *18 thereof, inclusive. They are printed above on pages 20 to 33 of this printed case, and are therefore omitted here, by consent.

Order That Cause Stand Over, &c. Filed May 5, 1896.

The affidavits of the petitioner and of her former counsel
157 having been taken herein pursuant to the memorandum heretofore handed down herein by the chancellor, and it appearing that the defendant is desirous of examining further witnesses on his own behalf,

It is on this 20th day of April, 1896, on motion of James Westervelt, petitioner's solicitor,

Ordered that this cause stand over one week, to the end that defendant may examine such witnesses as may be necessary.

And it is on like motion further ordered that all affidavits to be taken on behalf of defendant be presented on the 27th day of April, 1896, and that the affidavits which have been already taken be also presented on that date.

ALEX. T. McGILL, *C.*

Here follows order amending decree of divorce, which is identical with that on pages *54 and *55 of said Exhibit "A." It is printed hereinabove at pages 69 and 70, and is therefore omitted here by consent.

The order of reference which follows next is likewise here omitted, as it is identical with Exhibit "M," printed hereinabove at page 87.

Order Denying Motion. Filed July 13, 1897.

Notice of an application having been made to the court on the twelfth day of July, A. D. 1897, at the chancellor's chambers, in Jersey City, by James Westervelt, solicitor for petitioner, to have paid the balance of the one hundred dollars on deposit to cover costs on appeal of the said cause to the court of errors and appeals, after paying the defendant's costs on appeal to James Westervelt,

solicitor for said petitioner, it is on this twelfth day of July,
158 A. D. 1897, ordered that the said motion be denied.
By the statute.

H. C. PITNEY, *Master.*

Order that Commission Issue, &c. Filed Sept. 27, 1897.

Upon opening this matter to the court by James Westervelt, Esq., solicitor of petitioner, and it appearing by affidavit to the satisfaction of the chancellor that the Long Island Loan & Trust Company, William Merritt, its president, Frederick T. Aldridge, its secretary or one of its other officers, is a material witness for the petitioner in this cause, and that the said Long Island Loan & Trust Company resides or has its principal office or place of business in the city of Brooklyn, county of Kings and State of New York, and that the said petitioner cannot safely proceed to the hearing of this cause without the benefit of its or their testimony, it is, on this 27th day of September, 1897, on motion of James Westervelt, solicitor of petitioner,

Ordered that a commission issue out of and under the seal of this court, directed to Washington B. Williams, Esq., master in chancery of Jersey City, in the county of Hudson and State of New Jersey, authorizing him to examine the said Long Island Loan & Trust Company above named, by its president, the said William Merritt, or its secretary, the said Frederick T. Aldridge, or other principal officer on oath or affirmation, upon the interrogatories annexed to said commission, and to reduce said examination to writing, and to return the same annexed to the said commission unto this court on or before the 10th day of October next.

ALEX. T. McGILL, *C.*

Respectfully advised.
FREDERICK W. STEVENS, *V. C.*

159 *Order Extending Time. Filed December 4th,* 1897.

Upon opening this matter to the court by James Westervelt, solicitor of petitioner, and it appearing from the record herein that an order was made in this cause on the 27th day of September, 1897, that a commission issue out of and under the seal of this court, directed to Washington B. Williams, Esquire, master in chancery, etc., etc., authorizing him to examine certain witnesses therein named, it is, on this 4th day of December, 1897, on motion of James Westervelt, solicitor of petitioner,

Ordered that the time within which said commission, together with the evidence taken thereunder, must be returned into this court be and the same hereby is extended to the 8th day of December inst.

ALEX. T. McGILL, *C.*

Here follows the master's report on the amount of alimony, which is the same as Exhibit "N" annexed to the complaint, printed above on pages 90 to 93. It is therefore omitted here by consent.

On like consent there are also here omitted the rule *nisi* to confirm said report, the final decree, and the notice of application for a receiver and proof of service thereof on defendant, which are identical respectively with Exhibits "O," "P" and "Q" annexed to the complaint. They are all printed above at pages 93 to 102 inclusive, which see.

160 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

Upon opening this matter to the court by James Westervelt, solicitor of the petitioner, and due proof being made of due notice having been given to the defendant of the application for the appointment of a receiver of the property of the defendant herein, and no one appearing on behalf of defendant to oppose said application, it is, for good cause shown, on this 8th day of February, 1898, on motion of James Westervelt, aforesaid,

Ordered, that the hearing of the aforesaid application for the appointment of a receiver do stand over until the 14th day of February inst. at ten o'clock in the forenoon, at chancery chambers in Jersey City.

ALEX. T. McGILL, *C.*

Respectfully advised.
FREDERICK W. STEVENS, *V. C.*

161 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.
} On Petition. Affidavit.

STATE OF NEW JERSEY, *County of Essex*, } *ss.:*

James Westervelt, being duly sworn, on his oath says that he is the solicitor for the petitioner in the above-entitled cause, and that on the 18th day of January, 1898, he personally served a certified copy of the decree in this cause, dated the 28th day of December, 1897, upon Charles W. Lynde, the defendant herein, together with notice of an application for the appointment of a receiver of the said defendant's property, to be made on the 8th day of February, 1897, as more fully appears by deponent's affidavit, dated January 28th, 1898, and filed herewith.

Deponent further says that at the time such service was made deponent served upon the defendant a formal demand for compliance with the provisions of the said decree, a copy of which is hereto annexed. Defendant distinctly refused to comply with the said de-

ree, and refused to pay any of the sums of money therein directed
o be paid by him, or to give a bond to the petitioner as therein
irected, and the said defendant has at all times since then refused
o comply with any of the provisions of said decree, and has not
iven bond in accordance therewith, and has not paid to the peti-
ioner or to deponent as her solicitor one dollar on account
thereof.

162 Deponent further says that at the time of the said service the said defendant spoke of himself to the deponent as a rich man, and for further details as to the defendant's property deponent refers to the master's report filed in this cause on the fifteenth day of December, 1897, and to the proofs taken before the said master showing that the defendant is worth about a half million of dollars.

Wherefore deponent asks for an order appointing a receiver of the property of the defendant, in accordance with the provisions of the decree herein aforesaid.

JAMES WESTERVELT.

Subscribed and sworn to before me this 8th day of February, 1898.

EDWARD D. DUFFIELD,
Master in Chancery of New Jersey.

DEAR SIR: I hereby demand that you forthwith comply with the provisions of a decree of the court of chancery of New Jersey, dated December 28th, 1897, in a case wherein Mary W. Lynde is petitioner and you are defendant, of which a certified copy is herewith served upon you; and that you pay to the said Mary W. Lynde the several sums therein decreed to be paid to her by you, to wit: the sum of seven thousand eight hundred and forty dollars ($7,840.00) for alimony due her up to the date of said decree, together with interest thereon from said date at the rate of six per centum per annum; the further sum of one thousand dollars ($1,000.00) as counsel fee, together with the sum of one hundred and thirty-six dollars and seven cents ($136.07) her taxed costs as shown on the taxed bill

163 of costs, whereof a certified copy is also herewith served upon you; making in all the sum of eight thousand nine hundred and seventy-six dollars and seven cents, with interest thereon at the aforesaid rate from December 28th, 1897.

And I further demand that you pay to the said Mary W. Lynde the sum of eighty dollars ($80.00) per week, which is due and payable according to the terms of said decree at the termination of each and every week from said 28th day of December, 1897, with interest on each of said weekly payments from the dates when they severally fall due at the rate of six per cent. per annum.

And I further demand that you give bond to said Mary W. Lynde, in accordance with said decree, in the sum of ten thousand dollars to secure the payment of the aforesaid several sums of money.

And you are hereby notified that in the event of your failure to

comply with any of the above demands I shall proceed against you by the appropriate remedy under the laws of the State of New York to compel you to do so.

Dated New York, January 14th, 1898.

Yours, &c., JAMES WESTERVELT,
Attorney for Mary W. Lynde.

Office & P. O. address, 52 Wall St., N. Y. city.

To Charles W. Lynde, Esq.

164 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition. Affidavit.

STATE OF NEW JERSEY, }
County of Hudson, } *ss:*

James Westervelt, being duly sworn, says that he is the solicitor of the petitioner herein, and that he is informed and verily believes that Charles W. Lynde, the defendant, owns and is possessed of the following property and securities, among others:

25 shares, common stock, H. B. Claflin Co., worth $100 per share, on which quarterly dividends are paid, of not less than $1.50 per share, on the 15th days of January, April, July and October in each year.

200 shares, preferred stock, Herring Hall Marvin Safe Co., worth $30.00 per share, or $6,000 in all.

600 shares, New York, Susquehanna & Western R. R. Co., preferred, worth $35.50 per share, or $21,300.00 in all.

5, $1,000.00 bonds of the N. Y., Susquehanna & Western R. R. Co., worth about $980.00 each, on which interest is paid at the rate of 4½ per cent. per annum, payable semi-annually, and, as deponent is informed, on the first days of February and August in each year.

Deponent further says that each of said corporations is a
165 corporation organized and existing under and by virtue of the laws of the State of New Jersey, and has its principal office in said State.

The grounds of deponent's knowledge, and the sources of his belief as to the foregoing matters, are the proofs taken herein before Washington B. Williams, Esq., as special master, and especially the accounting and decree in the surrogate's court of Kings county, New York, received in evidence on the hearing before said special master and marked Exhibit P 4, July 29, 1897, and the testimony of John Oscar Ball; together with the testimony taken by the said Washington B. Williams, Esq., as commissioner herein; from all of which it appears that the foregoing securities, among others, were turned over to the defendant herein by the executor of his father,

Charles R. Lynde, deceased, having been kept in specie, unsold, by said executor, at the special instance and request of the defendant, Charles W. Lynde, and his brother, who are the only residuary legatees under the will of their father, Charles R. Lynde, deceased.

JAMES WESTERVELT.

Subscribed and sworn to at Jersey City, this 14th day of February, 1898, before me—

PIERRE F. COOK,
Master in Chancery of New Jersey.

Endorsed in the aforesaid action: "Affidavits on application for a receiver. Filed March 24, 1898."

Here follows the order of March 24, 1898, appointing a receiver of defendant's property in New Jersey, &c., which is identical with Exhibit "R" annexed to the complaint, printed above on pages 103 to 106. It is, therefore, not reprinted here, by consent.

166 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

Upon opening this matter to the court by James Westervelt, solicitor of the petitioner, and the court having heretofore made an order herein on the 24th day of March, 1898, directing among other things that an injunction issue in accordance therewith;

And it appearing to the court by the statements of counsel that the issuance of the writ pursuant thereto was delayed through inadvertence beyond the period prescribed by the rules of this court, and that the parties hereto have not changed their relative positions since the date of the aforesaid order, and that the same reasons for the issuance of an injunction exist now as at the date of said order, it is, on this 15th day of April, 1898, on motion of James Westervelt aforesaid, ordered that an injunction issue according to the terms of said order of March 24th, 1898.

ALEX. T. McGILL, *C.*

Respectfully advised.
FREDERICK W. STEVENS, *V. C.*

167 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.
} On Petition. Notice.

SIRS: Please take notice that the undersigned was appointed receiver of all the real and personal property in the State of New Jersey of the above-named defendant, Charles W. Lynde, by order

of this court dated the twenty-fourth day of March, 1898, and has duly qualified as such receiver; and you will please take further notice that I hereby demand of you and each of you that you forthwith deliver to me all property of the said defendant now in your possession, and that you pay to me as such receiver all moneys due or to grow due to the said defendant, from you or either of you for dividends upon stock, or in payment of coupons or interest upon bonds in or of your several corporations, and that you must not pay any such moneys to Charles W. Lynde, the defendant herein, and that if you do so it will be at your peril, and in violation of the injunction of this court issued in accordance with the aforesaid order.

Yours, &c., CHARLES L. CARRICK, *Receiver.*

To H. B. Claflin & Co., Herring Hall Marvin Safe Company, New York, Susquehanna & Western R. R. Co.

168 Endorsed: "In chancery of New Jersey. Between Mary W. Lynde, petitioner, and Charles W. Lynde, defendant. On petition, &c. Notice. James Westervelt, sol'r.

"Service of the within notice acknowledged this 15th day of April, 1898.

H. B. CLAFLIN & CO.,
Per EDWARD NUGENT.

"Due service of the annexed receiver's notice and injunction herein is hereby admitted and acknowledged April 29, 1898.

ROB'T H. MOUSEER,
Transfer Agent.
W. D. POWNALL,
Of and for Receivers of Herring Hall Marvin Co."

NEW JERSEY, *To wit:*

The State of New Jersey to Charles W. Lynde, servants, attorneys, and agents, and each and every of them, Greeting:

Whereas, it hath been represented to us, in our court of chancery, on the part of Mary W. Lynde, petitioner, that she has lately exhibited her petition of complaint against you, the said defendant, to be relieved touching the matters set forth in the said petition:

We, therefore, in consideration of the premises, and of the
169 particular matters set forth in the said petition, do strictly enjoin and command you, the said Charles W. Lynde, and all and every the persons before mentioned, and each and every of you, under the penalty that may fall thereon, that you and every of you, do absolutely desist and refrain from assigning, transferring, or otherwise disposing of any of the following stocks and bonds in New Jersey corporations, to wit: 25 shares common stock of H. B. Claflin Co.; 200 shares preferred stock of Herring-Hall-Marvin Safe Co.; 600 shares preferred stock of the New York, Susquehanna and Western R. R. Co.; 5 4½ per cent. $1,000.00 bonds of the

New York, Susquehanna and Western R. R. Co., or any other stocks and bonds of the said corporation-, or either of them, now owned by you, said Charles W. Lynde, and from assigning, transferring or otherwise disposing of any other real or personal property belonging to you, in the State of New Jersey, to any person or corporation other than the receiver appointed herein, and from in anywise interfering with the said receiver in the performance of his duties, or offering any obstruction or opposition to him therein, and from paying or assigning or transferring to any person or corporation other than the said receiver, any sums due or to grow due to the said Charles W. Lynde, as or for dividends upon stocks of the said corporations, or either of them, or as or for the several amounts due or to *drow* due upon any coupons attached to bonds of the said corporations, or either of them, now owned or possessed by you, the said Charles W. Lynde, until you, the said defendant, shall have fully answered the said bill of complaint, and our said court shall make other order to the contrary.

Witness his honor, Alexander T. McGill, our chancellor,
170 at Trenton, the eighteenth day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES WESTERVELT, *Sol'r.*
L. A. THOMPSON, *Clerk.*

A true copy.
L. A. THOMPSON, *Clerk.*

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant. } On Petition, &c. Proof of Service.

STATE OF NEW JERSEY, *Hudson County,* } *ss.:*

Frank H. Dobson, of full age, being duly sworn according to law, on his oath says that on Thursday, the twenty-first day of April, instant, at the city of Elizabeth, in the county of Union and State of New Jersey, he served a true copy of the injunction hereto annexed upon Edward Nugent, the agent of the H. B. Claflin Company, by delivering the same to him personally.

FRANK H. DOBSON.

Subscribed and sworn to before me at Jersey City this 25th day of April, A. D. 1898.

JOHN L. KELLER,
Master in Ch'cy of N. J.

171 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

STATE OF NEW YORK,
City and County of New York, } ss.:

James Westervelt, of full age, being duly sworn, on his oath says that on the 29th day of April, 1898, he served the annexed notice and injunction as follows:

On the New York, Susquehanna & Western R. R. Co., at No. 26 Cortlandt street, in the city of New York, borough of Manhattan, in the county and State of New York, by delivering copies thereof to Frederick P. Moore, vice-president, and Robert H. Mouten, transfer agent, of said company personally; and

On W. D. Pownall, one of the receivers of Herring-Hall-Marvin Safe Co., appointed by this court, at the office of said company, at the corner of Elm and Bleecker streets, in the city and borough aforesaid, by delivering copies thereof to said Pownall personally.

JAMES WESTERVELT.

Subscribed and sworn to at New York city in said county, this 29th day of April, 1898, before me, who am a notary public in and for said county and State.

HENRY B. GAYLEY,
[L. S.] *Notary Public, New York County.*

172 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

STATE OF NEW YORK,
County of New York, } ss.:

Percy F. Garnett, being duly sworn according to law, on his oath saith that he is a clerk in the office of James Westervelt, attorney for the petitioner above named. That on the 14th day of April, 1898, at 31 Nassau street, in the city of New Yark, borough of Manhattan, in the county and State of New York, he served the annexed receiver's notice upon Connor & Co., the transfer agents of Herring-Hall-Marvin Safe Company by delivering a copy thereof to the cashier of said Connor & Co. personally.

PERCY F. GARNETT.

Subscribed and sworn to at New York city this 29th day of April,

1898, before me, who am a notary public in and for said city and county.

HENRY B. GAYLEY,
Notary Public, N. Y. Co.

[L. S.]

Endorsed in the title of the action. "Injunction, receiver's notice, and proof of service. Filed Ap'l 30, 1898."

173 The foregoing papers were duly exemplified and endorsed "In chancery of New Jersey. Between Mary W. Lynde, petitioner, and Charles W. Lynde, defendant. Transcript of enrollment, &c. James Westervelt, solicitor for petitioner." And marked "Pl'ff's Ex. No. 1, Nov. 5, 1898. J. C. K."

The exemplification is omitted by consent.

Plaintiff's Exhibit No. 2 consists of a duly authenticated and exemplified copy of the following papers in this cause in the court of chancery of New Jersey, all of which appear elsewhere in this printed case.

Two signed stipulations, which are identical with Exhibits "B" and "C," annexed to the complaint, printed above at pages 74 and 75, which see.

Two affidavits executed by Charles W. Lynde, the defendant, and Rollin H. Lynde, his brother, respectively, which are identical with Exhibit "D," annexed to the complaint, printed above at pages 76 to 80, which see.

Two notices of taking testimony, signed by the defendant's solicitor, Mr. Potts, which are identical with Exhibits "F" and "G," annexed to the complaint, printed above at pages 82 and 83, which see.

Notice of appeal by defendant, endorsed "In chancery of New Jersey. Between Mary W. Lynde, pet'*s*, and Charles W. Lynde, def't. Notice of appeal. J. Herbert Potts, sol'r of def't. Filed Nov. 6, 1896." It is otherwise identical with the notice on pages Nos. *55 and *56 of Exhibit "A," annexed to the complaint, printed above at pages 70 and 71, which see.

And the foregoing are therefore not reprinted here by consent.

174 PLAINTIFF'S EXHIBIT No. III.

Telephone No. 726 B.

Master in chancery, notary public.

Law offices J. Herbert Potts, 1 Montgomery street, Fuller bldg., Jersey City, N. J.

JULY 8, 1897.

James Westervelt, Esq., 52 Wall St., N. Y. city.

DEAR SIR: In relation to the motion that you have given me notice of making on Monday in the Lynde *vs.* Lynde matter, will you make it at about 11.45, as in the court over which I preside we

have a very heavy list on Mondays, I will not be able to get down much before that time. I will be there at that hour.

Yours truly,

J. HERBERT POTTS,
Per B.

PLAINTIFF'S EXHIBIT No. IV.

The following are copies of the sections of the divorce act of New Jersey which were put in evidence upon the trial:

1. Jurisdiction of the court of chancery.

An act concerning divorces.

Revision approved March 27, 1874.

1. (Amended by sec. 39, *post.*)

Section 39 is as follows:

Amendatory act, approved March 7, 1889.

That section one of said act, which said section now reads as follows (see Rev., p. 314), be and the same is hereby amended so that henceforth the said section shall read as follows, to wit:

175 (That the court of chancery shall have jurisdiction of all causes of divorce and of alimony or maintenance, by this act directed and allowed; provided, the parties complainant and defendant or either of them, were or shall be inhabitants of this State at the time of the injury, desertion or neglect complained of, or where the marriage shall have been solemnized or taken place within this State, and the complainant shall have been an actual resident in the State at the time of the injury, desertion or neglect complained of and at the time of exhibiting the bill; or where the adultery was committed in this State, and the parties complainant and defendant, or either of them, reside in this State at the time of exhibiting the bill; or where the complainant or defendant shall be a resident of this State at the time of filing the bill of complaint, and the complainant or defendant shall have been a resident of this State for the term of two years, during which such desertion shall have continued; provided, such complainant shall make his or her oath or affirmation, to be annexed to the bill of complaint, that his or her complaint is not made by any collusion between him or her and the defendant, for the purpose of dissolving their marriage, but in truth and good faith, for the causes set forth in the bill of complaint.)

SEC. 6. That the like process and course of practice and procedure shall be had and pursued in all such causes as are usually had and pursued in other causes on the equity side of the said court, except that the answer of defendants shall not be under oath.

SEC. 19. That when a divorce shall be decreed, it shall and may be lawful for the court of chancery to take such order touching the alimony and maintenance of the wife, and also touching the care

and maintenance of the children, or any of them, by the
176 said husband, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just; and in case the wife is the complainant, to order the defendant to give reasonable security for such alimony and maintenance; and upon his neglect or refusal to give such reasonable security as shall be required of him, or upon default of him and his surety, if any there be, to pay or provide such alimony and maintenance, to award and issue process for the immediate sequestration of the defendant's personal estate, and the rents and profits of his real estate, and to appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied towards such maintenance and allowance, or to such maintenance and allowance as to the said court shall from time to time seem reasonable and just, or to enforce the performance of the said decree or orders by such other lawful ways and means as is usual, and according to the course and practice of the court of chancery.

Copy Rule 20, *Court of Chancery.*

All notices of motion, all notices of taking testimony, all summonses to attend a master, orders to confirm reports unless good cause shown, and all orders *nisi*, shall be served on the solicitor of the adverse party, if a solicitor be concerned for him; but if no solicitor be concerned for him, the service may be on the party, or left at his usual place of residence, or, if not resident in this State, by setting up the same in the office of the clerk of this court.

177 DEFENDANT'S EXHIBIT No. 1.

61 THIRD PLACE, BROOKLYN, N. Y., *March 22d*, 1897.

J. Herbert Potts, Esq., 1 Montgomery St., Jersey City, N. J.

DEAR SIR: Not hearing from you relative to meeting Mr. Ingraham, I desire to give you formal notice that I do not wish to be represented in New Jersey in the case of Lynde *vs.* Lynde, further than the court of errors and appeals. Whether the decision of the court of errors and appeals be for or against my interests, drop the case after their decision and also kindly inform Mr. Chas. C. Black to that effect. I find, that by being represented further, after the decision of the court of errors and appeals, will give my opponents jurisdiction over my affairs in New York State. Hoping you will appreciate my intention and wishing both you and Mr. Black success in May, I remain,

Yours very truly, CHAS. W. LYNDE.

P. S.—Kindly acknowledge receipt and oblige.

178 DEFENDANT'S EXHIBIT No. 2.

In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

Upon opening this matter to the court by James Westervelt, solicitor of petitioner, and it appearing to the court by the annexed affidavit of Percy Garnett, that the annexed notice of motion for an order directing that a commission issue in this cause, for the examination of a certain witness in the State of New York, as set forth in the motion papers annexed to said notice, was duly served on J. Herbert Potts, Esq., as solicitor for defendant, and the said J. Herbert Potts, having appeared and stated in open court that he is no longer solicitor of defendant—

It is thereupon ordered on this 7th day of September, 1897, that the motion of petitioner for an order directing that a commission issue be and the same hereby is denied with leave to petitioner to renew the application therefor on personal service of notice thereof upon the defendant either within or without the State.

ALEX. T. McGILL, *C.*

A true copy.
L. A. THOMPSON, *Clerk.*

179 In Chancery of New Jersey.

Between—

MARY W. LYNDE, Petitioner,
and
CHARLES W. LYNDE, Defendant.

STATE OF NEW YORK,
City and County of New York, } *ss.:*

James Westervelt, being duly sworn, on his oath says that he is solicitor for the petitioner in the above-entitled cause, and that, as more fully appears by the records of this court, J. Herbert Potts, Esq., of Jersey City, has heretofore appeared herein and acted as solicitor for the defendant for the period of more than eighteen months last past.

Deponent further says that this is an action for divorce and alimony, and that on or about August 7th, 1893, a decree was entered herein divorcing petitioner from defendant, and that thereafter and on or about February 11th, 1896, the petitioner filed herein, through deponent as her solicitor, a petition asking that the aforesaid decree of August 7th, 1893, be opened and amended so as to award alimony to petitioner, to be paid by defendant, all of which more fully appears by the said petition now on file in this court.

Deponent further says that thereafter such proceedings were had

that on or about October 28th, 1896, his honor the chancellor made an order granting the petition of petitioner, and directing that the decree of August 7th, 1893, be opened and amended so as to give the petitioner leave to apply for alimony to be paid to her by the defendant. As to the exact wording of said order deponent
180 hereby refers to the same, and makes it a part hereof as if herein set forth in full, said order being now on the records of this court. Deponent further says that thereafter defendant, through the said J. Herbert Potts, his attorney, appealed from the order of said chancellor to the said court of errors and appeals herein, and that the said appeal has been dismissed, and the said order of his honor the chancellor has been affirmed by said court of errors and appeals, and that thereafter and on the 12th day of July, 1896, an order was duly made on notice to defendant's said solicitor, and entered in this cause referring the same to Washington B. Williams, Esq., to ascertain and report whether alimony should be paid by defendant to petitioner, and if so how much, and that there have been two hearings before the said master so appointed to take testimony as aforesaid.

Deponent further says that from the time the aforesaid petition to amend the decree of August 7th, 1893, was filed herein, until the time said order of reference to the said Washington B. Williams, Esq., was made herein, the said J. Herbert Potts uniformly acted as solicitor for the defendant herein, and that all papers, notices of motion, &c., were served on him as such solicitor, and said service acknowledged by him as such solicitor for defendant, all of which more fully appears by the several notices, orders and other papers now on file in the records of this court herein. Deponent further says that on the 7th day of September, instant, in the chancery chambers in Jersey City, at which time a motion made on behalf of petitioner herein for an order directing that a commission issue, &c., was returnable, notice of which motion with the proper motion papers, returnable at said time and place, had theretofore been duly served on the said J. Herbert Potts, Esq., as solicitor of defendant herein, the said J. Herbert Potts appeared before his honor
181 the chancellor, and stated that he was no longer solicitor of defendant, all of which appears by the order, a copy of which is hereto annexed, which order was made herein by his honor the chancellor on said 7th day of September, and thereafter duly filed in this court together with the aforesaid motion papers.

Deponent further says that as appears by the affidavit of Irving W. Dimelow, sworn to the 9th day of September, 1897, and annexed hereto, there was personally served upon Charles W. Lynde, the defendant herein, upon the 8th day of September, 1897, a notice that in the event of the failure of the said Charles W. Lynde, the defendant, to appear at chancery chambers in the city of Newark, on Tuesday, the 14th day of September inst., at ten o'clock in the forenoon, or in the meantime to appoint a new solicitor in this cause, deponent would then apply to the chancellor for further order directing that this cause proceed thereafter *ex parte* and that defendant failed to appear pursuant thereto, but deponent withdrew said application

at that time for the purpose of renewing it on additional motion papers.

Wherefore deponent prays for an order directing that this cause proceed hereafter *ex parte*, defendant having failed to appoint a new solicitor.

JAMES WESTERVELT.

Subscribed and sworn to at New York city this 15th day of September, 1897, before me, who am a notary public in and for the city and county of New York.

HENRY B. GAYLEY,
Notary Public, New York County.

[L. S.]
A true copy.
L. A. THOMPSON, *Clerk.*

182 The foregoing papers were duly exemplified and marked "Defendant's Exhibit No. 2, Nov., 1898." The exemplification is omitted by consent.

In Chancery in New Jersey.

MARY W. LYNDE, Respondent,
vs.
CHARLES W. LYNDE, Appellant.

It is hereby stipulated that the foregoing are true copies of the judgment-roll, notice of appeal, opinion, case and exceptions herein, and certification by the clerk of the county of Suffolk is hereby waived.

The foregoing case contains all the evidence taken on the trial of this action.

Dated February 8th, 1899.

GEORGE S. INGRAHAM,
Attorney for Appellant.

JAMES WESTERVELT,
Attorney for Respondent.

183 New York Supreme Court, Appellate Division, Second Department.

MARY W. LYNDE, Respondent,
vs.
CHARLES W. LYNDE, Appellant.

WILLARD BARTLETT, *J.*:

The purpose of this action is to enforce a claim for alimony for which the plaintiff has obtained a judgment against the defendant in the court of chancery of New Jersey. The alimony was not granted by the original decree of divorce which was based on the ground of desertion and was procured after service of process by

publication upon the husband, who was not served personally within the State and did not then appear. The wife, however, subsequently made application to the chancellor to amend the decree by adding thereto a provision authorizing her to apply at the foot thereof at any time thereafter for reasonable alimony and such other relief touching alimony as might be equitable and just. The husband appeared generally by his solicitor, in opposition to this application, which was granted by the chancellor. (Lynde *vs.* Lynde, 54 N. J. Eq., 473.) The defendant thereupon appealed from the order amending the decree, and it was unanimously affirmed by the court of errors and appeals of New Jersey, for the reason given by the chancellor below. (55 N. J. Eq., 591.) The vice-chancellor, upon due notice to the defendant's solicitor, then made an order of reference to a special master in chancery to as-

184 certain whether alimony should be allowed to the plaintiff, and if so how much. Notice of hearing before the master was given to the defendant's solicitor, who did not attend the reference, however, and who shortly after informed the chancellor that he was no longer solicitor for the defendant. This gentleman did not appear in the subsequent proceeding- in the cause although notified of the same. Upon the master's report, the chancellor, on December 28, 1897, made a final decree supplementary to the amended decree of divorce awarding the wife $7,840 back alimony and further alimony at the rate of $80 a week, authorizing the issue of execution therefor, declaring the sums awarded as alimony to be liens upon the defendant's real estate, requiring him to give security for the payment of such sums, and providing for sequestration and a receivership in case of the defendant's failure to make the prescribed payments or furnish the prescribed security.

The present suit is based upon this decree for alimony, and has resulted in a judgment at the special term that the same be enforced " with like force and effect as if the same were a judgment of this court." The defendant's appeal raised two important questions: (1) Had the court of chancery in New Jersey jurisdiction to render the judgment for alimony against the defendant? (2) If so, has supreme court of this State any authority to enforce the New York judgment based upon the New Jersey decree for alimony, except by execution as a simple money judgment?

(1) Had the court of chancery in New Jersey jurisdiction to render the judgment for alimony against the defendant?

The decree of divorce as it originally stood, having been granted against the non-resident defendant without personal service upon him in New Jersey or an appearance by him therein, would not be recognized in this State as a valid judgment. (People

185 *vs.* Baker, 76 N. Y., 78; O'Dea *vs.* O'Dea, 101 *id.*, 23.) When the plaintiff sought to amend the decree, however, by adding a provision which would enable her to recover alimony, she obtained an order from the chancellor requiring the defendant to show cause why her petition to that end should not be granted. This order to show cause provided for the service of a certified copy thereof and of the petition upon the defendant, either within or

without the State. It does not appear where the papers were actually served, but a memorandum by the chancellor in the record shows that when this application to amend the decree subsequently came before him, Mr. J. Herbert Potts and Mr. C. H. Voorhis appeared for the defendant in opposition to the desired amendment. In the memorandum Chancellor McGill says: "It is asserted on behalf of the petitioner that the decree in this case failed to include any provision for alimony because of the neglect of the petitioner's solicitor, who did not carry out the petitioner's instructions in that behalf, and, upon the other side, it is alleged that the failure to ask for alimony, when the decree was taken, was the deliberate act of both the petitioner and her counsel, with intent to give up alimony in order to facilitate them in obtaining a decree for divorce." The language which I have italicised certainly indicates that the defendant appeared in the proceeding by counsel to oppose the application on the merits. In order to ascertain the exact state of facts, the chancellor directed the taking of affidavits, adding: "Both the petitioner and her former counsel should be examined and cross-examined." Pursuant to this memorandum, testimony was taken stenographically before a master, whose record shows that "J. Herbert Potts, Esquire, solicitor of defendant," was present at the hearing, and that he cross-examined the petitioner and another witness, who testified in her behalf. Subsequently Mr. Potts served upon
186 Mr. James Westervelt, the petitioner's solicitor, notices that testimony would be taken in behalf of the defendant before masters in chancery at Trenton and Jersey City, and the minutes of the master in each instance show that Mr. Potts attended the hearing as counsel for the defendant and examined the witnesses. On the argument of the case before the chancellor he represented the defendant, and the defendant's notice and petition of appeal to the court of errors and appeals bear the signature of Mr. Potts as solicitor and Mr. Charles C. Black as counsel. There are also several stipulations in the New Jersey record, signed by Mr. Potts as defendant's solicitor in the proceeding. Neither in any paper served by Mr. Potts, nor in any of the orders made by the courts in New Jersey, is there anything to indicate that he intended to restrict his appearance to the single purpose of denying the jurisdiction of the chancellor to amend the original decree of divorce. On the contrary, the testimony which he introduced in the proceeding could only have been designed to secure a denial of the application on the merits, for it was intended to show the falsity of the plaintiff's claim that all provision for alimony was omitted from the decree by reason of the neglect of her solicitor to carry out her instructions.

Upon the trial of the present case Mr. Potts testifies that he did question the jurisdiction of the court of chancery in the amendment proceeding, on the ground that the defendant had never been served with process and on other grounds; and the grounds specified in his petition of appeal to the court of errors and appeals also relate to the jurisdiction of the chancellor. In no manner, however, did he limit his appearance or action in behalf of the defendant to the assertion of the proposition that the court had never

obtained any such jurisdiction over the person of the defendant as to empower it to amend the decree. He went further and
187 litigated the application on its merits; and I think the learned judge at special term was justified in holding that he appeared generally in the cause.

But the appellant confronts us with the proposition that an appearance in opposition to a motion to amend a decree of divorce could not galvanize into life a judgment which previously was void, and he cites Kamp *vs.* Kamp (59 N. Y., 212). That case, however, differed radically from the case at bar. There was no attempt there to amend the judgment. The effort was to obtain an order for alimony long subsequent to the decree of divorce, notwithstanding that the decree as it stood had presumably decided any claim for alimony adversely to the plaintiff, and gave no leave to the plaintiff to renew her claim in the future. The court of appeals decided that alimony could not be granted under those circumstances, but there is nothing in the opinions denying the power of a court, upon notice to the party to be affected, to amend a judgment in order to correct a mistake which was made in rendering it. Such was the power exercised by the chancellor of New Jersey in Lynde *vs.* Lynde (54 N. J. Eq., 473, 477). A mistake was made in omitting from the decree a reservation of the question of alimony for future determination. "I am satisfied," says the chancellor, "that the omission of the decree to reserve the question as to alimony was not a deliberate act of the petitioner's counsel, based upon the exercise of his judgment, but was due to the inadvertence of that gentleman in drafting the decree," and he declares the rule in New Jersey to be that the court will upon petition amend its enrolled decree, when the amendment is necessary to give full expression to its judgment, and is matter which would, without doubt, have been incorporated in the decree when made if attention had been called to it.
188 The highest court in New Jersey has held that this amendment was lawfully and properly made. To that adjudication the defendant, through his counsel, was a party. I cannot see why it is not binding upon him. The practice of reserving the question of alimony to a proceeding at the foot of the judgment has been sanctioned in this State (Galusha *vs.* Galusha, 138 N. Y., 272). "The demand for alimony in a divorce suit," says Maynard, J., in the case cited, "is not an essential part of the cause of action. * * * It need not be determined when the judgment dissolving the marriage is entered, providing the right to have it subsequently determined is reserved in the judgment." The amendment to the New Jersey decree reserved that right, and the adjudication resulting in that amendment, having been made in a proceeding in which there was a general appearance by the defendant, was a judicial determination which is binding upon him, to the effect that the original decree had sufficient validity to support an award of alimony, if the court should thereafter see fit to make one. The subsequent proceedings to fix the amount were merely ancillary to the amended complaint. The first of these was an application to the vice-chancellor for an order of reference to a master, and was made upon due notice to Mr.

Potts, as solicitor for the defendant. Several weeks later, upon the motion by the plaintiff for a commission, of which Mr. Potts, as the defendant's solicitor, had also been duly notified, that gentleman stated to the chancellor that he was no longer the solicitor for the defendant. The court of chancery did not lose jurisdiction by reason of counsel's withdrawing at this stage, but might lawfully proceed, as it evidently did thereafter, upon proof of service of notice of each step in the litigation upon Mr. Lynde without the State.

(2.) Having reached the conclusion that the court of chan-
189 cery in New Jersey had jurisdiction to render the judgment for alimony against the defendant, we now come to the second branch of the case: Has the supreme court of this State any authority to enforce its own judgment based upon the amended New Jersey decree, except by execution, as a simple money judgment? The special term has done very much more than this. Not only has it adjudged that the defendant pay to the plaintiff alimony, counsel fees and costs in excess of $14,000, and $80 per week alimony in the future, but it has required the defendant to give $100,000 security for the payment of such alimony, has enjoined him from disposing of any of his property except the income thereof until he makes the prescribed payments or gives such security, and has named a receiver to whom he must transfer his real and personal estate if he fails to pay the alimony or secure the payment thereof.

The extent to which the courts of this State will go in enforcing a judgment based upon a foreign decree for alimony is more fully and satisfactorily considered and discussed in Wood *vs.* Wood (7 Misc. Rep., 579) than in any other case which I have been able to find. It is a special term decision in the New York court of common pleas overruling a demurrer to a complaint. A determination of the point which arises here was not essential to the adjudication there; but the opinion of Judge Pryor upon the question whether the plaintiff could have the remedies of security and sequestration in aid of the claim for alimony established by her foreign judgment is entitled to the respect commanded by its cogent reasoning and the authorities he cites for his conclusion. That conclusion is that in such a case the plaintiff is entitled to no other relief than the recovery of past-due alimony to be collected by execution.

Concurring in that view, as I do, I shall not repeat or paraphrase
the able argument by which Judge Pryor supports it, but
190 shall merely call attention to some additional considerations tending to show that it is correct.

The proposition that the courts of this State have no jurisdiction over the subject of divorce except as they derive it from statute has quite recently been reasserted by the court of appeals. (Walker *vs.* Walker, 155 N. Y., 77.) A successful suit in New York, however, upon a New Jersey decree of divorce and alimony does not make the New Jersey decree as such a judgment of the courts of this State. That decree is merely evidence upon which the plaintiff obtains here, not a judgment of divorce and alimony, but a judgment authorizing the collection of a certain sum. Hence, our courts may

not afford the remedies which the Code of Civil Procedure authorizes here upon a judgment for alimony, but may only enforce the judgment as one for money.

There are numerous judicial opinions which declare in substance that a judgment sued upon in a sister State is entitled to the same effect there as it had in the State in which it was obtained. Probably no case has been more frequently cited in support of this rule than Barber *vs.* Barber (21 How., U. S., 582, 595.) It was there said by Mr. Justice Wayne that when a court having jurisdiction of a suit for divorce makes an allowance to the wife by way of alimony, "it becomes a judicial debt of record against the husband, which may be enforced by execution or attachment against his person issuing from the court which gave the decree; and, when that cannot be done on account of the husband having left or fled from that jurisdiction to another, where the process of that court cannot reach him, the wife, by her next friend, may sue him wherever he may be found or where he shall have acquired a new domicile for the purpose of recovering the alimony due to her or to carry
191 the decree into a judgment there with the same effect that it has in the State in which the decree was given."

Judge Pryor, in Wood *vs.* Wood (*supra*), declined to follow this dictum in the prevailing opinion in the Barber case, deeming the better argument to be that of the dissenting members of the court. But a careful examination of the facts, as stated by Mr. Justice Wayne himself (foot of page 587), shows that the case really involved no question as to the enforcement of the judgment by remedies exclusively appertaining to divorce jurisdiction. The decree granted upon the foreign judgment simply adjudged that a specific amount was due to the wife; that the husband should pay it, and, in default of such payment, execution should issue therefor. Though granted on the equity side of the court, it was to all intents and purposes simply a money judgment at law.

It is probable, therefore, that the language of Mr. Justice Wayne in Barber *vs.* Barber (*supra*), as to carrying a decree into a judgment with the same effect that it had in the State in which the decree was given, was not intended as an assertion that the plaintiff in the judgment could carry with it into another State the right to any particular remedies for its enforcement. Such a proposition would have been in conflict with the rule which he laid down many years earlier in M'Elmoyle *vs.* Cohen (13 Pet., 312, 324, 325), where he said: "The authenticity of a judgment and its effect depend upon the law made in pursuance of the constitution; the faith and credit due to it as the judicial proceeding of a State is given by the constitution, independently of all legislation. By the law of the 26th of May, 1790, the judgment is made a debt of record, not examinable upon its merits; but it does not carry with it into another State the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another
192 State, it must be made a judgment there, and can only be executed in the latter as its laws may permit. It must be conceded that the judgment of a State court cannot be enforced out

of the State by an execution issued within it. This concession admits the conclusion that, under the first section of the fourth article of the constitution, judgments out of the State in which they are rendered are only evidence in a sister State that the subject-matter of the suit has become a debt of record, which cannot be avoided but by the plea of *nul tiel* record."

This statement of the law has been approved by the Supreme Court of the United States as lately as 1887 in the case of Wisconsin *vs.* Pelican Ins. Co. (127 U. S., 265). The true rule seems to be that while a valid judgment in one State is effective in any other State, in which it is proven, as a determination of the legal status and rights of the parties to the litigation in respect to the matters liquidated, it does not take with it into that other State the right to any remedies, save such as are there established for the enforcement of judgment based upon judgments obtained elsewhere. As Mr. Freeman well says: "In some respects it is obvious that the judgment of the court of another State cannot have the same effect as a domestic judgment. Writs of execution cannot issue thereon, because the domestic courts have no authority to issue such writs in aid of the jurisdiction of foreign tribunals, nor can these latter tribunals issue writs which may be enforced in other States" (2 Freem. Judg., 4th ed., section 575).

In Wood *vs.* Wood (*supra*) Judge Pryor referred to the case of Bullock *vs.* Bullock (51 N. J. Eq., 444; 27 Atl. Rep., 435), where the chancellor refused to enforce the specific performance of a direction in a New York decree of divorce that the defendant should secure the alimony by the execution of a mortgage on his real estate in New Jersey. This decision has since been affirmed on ap-
193 peal, although only by a closely divided court (52 N. J. Eq., 561). In the opinion of Garrison, J., in favor of affirmance, the following passage clearly defines what I understand to be the judgment to which alone the Federal law gives conclusive effect: "That only is judgment that is pronounced between the parties to the action upon the matters submitted to the court for decision. To judgments thus rendered the Federal law accords in every State the same conclusive force possessed in the State where they are rendered. After judgment in a State court all that follows for the purpose of enabling the successful party to reap the benefits of the determination in his favor is execution or in aid of execution. No interpretation has ever been placed upon the Federal Constitution giving conclusive effect, or, indeed, any effect at all to the executions of the judgments rendered in sister States, or to any order merely in aid thereof." In this view, proof here of the New Jersey judgment for alimony in the present case, while it established the plaintiff's right to recover the amount of alimony thereby adjudged to be due, did not confer upon her any right to enforce payment of it in this State by means of the equitable remedies of sequestration, injunction, etc., which the New Jersey judgment provided for; nor could she here invoke the statutory provisions of our code in reference to the collection and enforcement of judgment awarding alimony, because, as has already been said, the jurisdiction of the New

York courts to apply these code remedies is limited to cases in which the judgment of divorce or separation is rendered here.

I do not mean to assert that cases might not arise in which equitable relief could be afforded to a plaintiff in an ancillary action after an unsuccessful attempt to collect by execution a judgment based on a foreign decree for alimony. Possibilities of this
194 kind are suggested by Wetmore *vs.* Wetmore (149 N. Y., 520). No such question, however, is involved in the present case. The views which have been expressed simply negative the power of the supreme court here to enforce the special-term judgment based upon the plaintiff's New Jersey decree by sequestration proceedings and the other modes specially provided in the Code of Civil Procedure for the collection of alimony.

The judgment appealed from should therefore be modified so as merely to adjudge that the plaintiff recover of the defendant the amount of the past-due alimony, together with the counsel fee awarded to her by the New Jersey decree. There is nothing in the point that the New Jersey judgment is not enforcible at all here, because, as the appellant contends, "our law could not award alimony to a woman divorced in 1893 from a husband then without means, nor could allow a mistake in judgment to be corrected after the lapse of two years from the entry of the judgment." The litigation concerning the question of alimony took place in New Jersey, and the procedure therein was subject to the regulations which prevail in that State.

All concurred.

195 *Order on Appeal from Judgment.*

At a term of the appellate division of the supreme court, held in and for the second judicial department, at the borough of Brooklyn, on the 6th day of June, 1899.

Present: Hon. William W. Goodrich, presiding justice;
" Edgar M. Cullen, }
" George B. Bradley, } justices.
" Willard Bartlett, }
" Edward W. Hatch, }

MARY W. LYNDE, Respondent, }
vs. }
CHARLES W. LYNDE, Appellant. }

The above-named Charles W. Lynde, the defendant in this action, having appealed to the appellate division of the supreme court from a judgment of the supreme court entered in the office of the clerk of the county of Suffolk on the 21st day of January, 1899, and from an order made by said court denying a motion for a new trial, and the said appeal having been argued by Mr. George S. Ingraham, of counsel for the appellant, and by Mr. James Westervelt, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby modified so as only to adjudge that

the plaintiff recover of the defendant the sum of $8,840.00, with costs (including an extra allowance of $442), amounting to
196 $553.38, and that as thus modified the said judgment appealed from be and the same is hereby affirmed, without costs of this appeal to either party.

Enter.

WILLIAM W. GOODRICH, *P. J.*

Supreme Court, Appellate Division, Second Judicial Department.

CLERK'S OFFICE, BROOKLYN, N. Y.

I, John B. Byrne, clerk of the appellate division of the supreme court in the second judicial department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above-entitled action, and entered in my office on the 6th day of June, 1899, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the city of Brooklyn, this 6th day of June, 1899.

JOHN B. BYRNE, *Clerk.*

Endorsed: "Filed — Suffolk county June 16th, 1899."

197 *Judgment of Affirmance.*

Supreme Court, County of Suffolk.

MARY W. LYNDE, Plaintiff, Respondent,
vs.
CHARLES W. LYNDE, Defendant, Appellant.

The appeal of the defendant to the appellate division of this court for the second department from the judgment entered herein in the office of the clerk of Suffolk county on the 21st day of January, 1899, having been argued before said appellate division, and the same having been modified, and as modified, affirmed, without costs to either party by an order entered herein on the 6th day of June, 1899, it is—

Ordered, adjudged and decreed that the said judgment entered herein in the office of the clerk of the county of Suffolk on the 21st day of January, 1899, be, and the same hereby is, modified so as only to adjudge that the plaintiff recover of the defendant the sum of eight thousand eight hundred and forty dollars with costs (including an extra allowance of $442), amounting to $553.38, and that, as thus modified, the said judgment appealed from be, and the same hereby is, affirmed without costs of said appeal to either party.

Judgment, June 16th, 1899.

WILLIAM R. DUVALL, *Clerk.*

Endorsed: "Filed June 16, 1899."

198 *Defendant's Notice of Appeal.*

New York Supreme Court, Appellate Division, Second Judicial Department.

MARY W. LYNDE, Plaintiff, Respondent,
vs.
CHARLES W. LYNDE, Defendant, Appellant.

Please take notice that the defendant appeals to the court of appeals, State of New York, from so much and such parts of the judgment of affirmance of the appellate division of the supreme court, entered herein in the office of the clerk of Suffolk county on the 16th day of June, 1899, as adjudges that the plaintiff recover of the defendant the sum of eight thousand eight hundred and forty dollars, with costs (including an extra allowance of $442), amounting to $553.38, also from that portion thereof which affirms, as thus modified, the judgment of the trial court herein, and from each and every part thereof.

GEORGE S. INGRAHAM,
Attorney for Defendant, 166 *Montague Street, Brooklyn, N. Y.*

To James Westervelt, Esq., attorney for plaintiff; county clerk of Suffolk county.

199 *Plaintiff's Notice of Appeal.*

New York Supreme Court, County of Suffolk.

MARY W. LYNDE, Plaintiff, Respondent, Appellant,
vs.
CHARLES W. LYNDE, Defendant, Appellant, Respondent.

SIRS: Please take notice that the plaintiff above named hereby appeals to the court of appeals from so much of the judgment of the appellate division of this court for the second judicial department, entered herein in the office of the clerk of this court on the 16th day of June, 1899, and from so much of the order of the said appellate division of this court for said second judicial department entered herein in the office of the clerk of the appellate division, second department, on the 6th day of June, 1899, a certified copy of which order was filed in the office of the clerk of the county of Suffolk on June 16th, 1899, as modifies the judgment entered herein on the 21st day of January, 1899, in the office of the clerk of Suffolk county, so as only to adjudge that the plaintiff recover of the defendant the sum of eight thousand eight hundred and forty dollars, with costs (including an extra allowance of $442), amounting to $553.38.

Dated New York, September 19th, 1899.

JAMES WESTERVELT,
Attorney for Respondent, Appellant.

To George S. Ingraham, Esq., attorney for appellant-respondent.
To William R. Duvall, Esq., clerk of Suffolk county.

200

Stipulation Waiving Certification.

Supreme Court, County of Suffolk.

MARY W. LYNDE, Plaintiff, Respondent, Appellant,
vs.
CHARLES W. LYNDE, Defendant, Appellant, Respondent.

Pursuant to section 3301 of the Code of the Civil Procedure, we hereby stipulate that the foregoing are copies of the judgment-roll, case on appeal, order, and notices of appeal to the court of appeals in this action, on file in the office of the clerk of the county of Suffolk, and we hereby waive certification by the clerk and consent that the appeal be argued upon the foregoing papers, and on the opinion of the appellate division.

JAMES WESTERVELT,
Attorney for Respondent, Appellant.
GEORGE S. INGRAHAM,
Attorney for Appellant, Respondent.

201

Court of Appeals.

STATE OF NEW YORK, *ss*:

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 6th day of April, in the year of our Lord one thousand nine hundred, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.
W. H. SHANKLAND, *Clerk.*

Remittitur, April 6th, 1900.

MARY W. LYNDE, Respondent, Appellant,
vs.
CHARLES W. LYNDE, Appellant, Respondent.

Be it remembered that on the 23rd day of September, in the year of our Lord one thousand eight hundred and ninety-nine, Charles W. Lynde, the appellant, respondent, in this action, came here into the court of appeals, by George S. Ingraham, his attorney, and filed in said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court in and for the second judicial department; and Mary W. Lynde, the respondent, appellant, in said action, afterwards appeared in said court of appeals, by James Westervelt, her attorney, and filed a notice of appeal from the judgment and order of the aforesaid appellate division.

202 Which said notices of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. James Westervelt, of counsel for the respondent, ap-

pellant, and by Mr. John H. Kemble, of counsel for the appellant, respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed, without costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed, without costs, as aforesaid, and stand in full force, strength and effect.

And hereupon, as well *as* the notices of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals.

CLERK'S OFFICE, ALBANY, *April 6th*, 1900.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

203 [Endorsed:] Court of appeals. Supreme court. Mary W. Lynde, pl'ff, resp., *vs.* Charles W. Lynde, def't, app'l'nt. Copy. Remittitur. George S. Ingraham, attorney for def't, app'l'nt, 166 Montague street, Brooklyn, N. Y.

204 MARY W. LYNDE, Respondent and Appellant,
v.
CHARLES W. LYNDE, Appellant and Respondent.

(Decided April 6, 1900.)

This action was brought upon a final decree of the court of chancery of the State of New Jersey; which, as the result of proceedings to recover alimony, adjudged that the plaintiff is entitled to recover of the defendant the sum of $7,840, and a counsel fee of $1,000; that the defendant pay to her permanent alimony at the rate of $80.00 a week from the date of the decree and that he give security for the payment of the several sums directed by the decree to be paid, and further provided, upon his failure to comply with the decree, that application might be made for sequestration proceedings, for a receivership and for an injunction. The complaint, also, asked to have enforced an order, made subsequently to the final decree, which appointed a receiver and enjoined the defendant from disposing of his property, etc.

The plaintiff and the defendant were married in the State of New Jersey in 1884, and were domiciled there. In 1892 the plaintiff filed her petition in chancery in that State, which alleged, among other things, desertion by her husband and cruel treatment, and prayed that she might be divorced from him and that reasonable alimony might be decreed to be paid to her. The defendant was not served personally, but by publication of process, and did not appear in the action nor answer the petition. Thereafter such proceedings were had in the case that, in 1893, a final decree was made, divorcing the petitioner from the defendant upon the ground of his willful and continued desertion, but containing no provision with respect to alimony. In 1896 the plaintiff filed a petition, upon affidavits, for the amendment of the decree of divorce, so as to provide for an award of alimony. The grounds of the application were that, though her petition in the divorce proceedings prayed for alimony, through the inadvertence, or neglect of her solicitor, the decree was entered without making provision adjudging the payment of alimony, or reserving the consideration thereof for hearing upon a future application. An order was granted by the chancellor, directing the defendant to show cause why the petition should not be granted; which, with the moving papers, was personally served upon the defendant in this State. The defendant appeared in opposition to the application, by J. Herbert Potts, as his solicitor, and without any reservation upon the record as to the appearance. He filed an affidavit, in which he alleged that his residence was in the State of New York; that he "was by the decree of this court divorced from the said petitioner from the bond of matrimony, upon her petition, on August 7th, 1893, and that since that time he has been married again to another woman, with whom he is now living," etc.; that "the decree for divorce was purposely drawn without providing for, or reserving any alimony," etc.; that he was "financially unable to pay alimony" and "that he is advised by
205 counsel and believes that the said decree having been made without reserving the question of alimony, and this defendant having been absolutely divorced from the said petitioner by said decree, and having since formed new relations and matrimonial obligations, that it would be illegal, inequitable and unjust to now impose upon him the burden of alimony, so long after the granting of said absolute decree dissolving his first matrimonial relations absolutely without terms."

After testimony had been taken, pursuant to an order of the chancellor, during the course of which Mr. Potts appeared as defendant's solicitor, and after argument upon the same by the solicitor for the petitioner and the solicitor for the defendant, the chancellor ordered that the decree of divorce theretofore made should be amended by inserting therein that "it is further ordered, adjudged and decreed that the petitioner, Mary W. Lynde, shall have the right to apply to this court at any time hereafter, at the foot of this decree, for reasonable alimony and such other relief in the premises touching alimony as may be equitable and just, and this court reserves the power to make such order or decree as may be necessary

to allow and compel the payment of alimony to petitioner by defendant, or to refuse to allow alimony." It appears in the opinion of the chancellor, which is made a part of the record (54 N. J. Eq., 473), that he was satisfied that the omission of the decree to reserve the question as to alimony was due to the inadvertence of the petitioner's counsel and that, under the rule recognized by the court, it will "amend its enrolled decree when the amendment is necessary to give full expression to its judgment." From the order amending the decree of divorce, the defendant appealed to the court of errors and appeals, where the order was affirmed. Thereupon, after reciting the various proceedings relating to the amendment of the decree of divorce, an order of reference was made as to whether alimony should be allowed to the petitioner and, if so, how much. This order was entered after service of a notice upon the defendant's solicitor and the reference was proceeded with after personal service upon the defendant of a summons to attend. Neither the defendant, nor his solicitor appeared upon the reference, although duly notified, and such proceedings were had that the final decree herein sued upon was made, on December 28th, 1897, by the chancellor; which, after reciting the proceedings had and the report of the master to whom it had been referred to report as to alimony, and "adjudging that a money judgment should be rendered against the defendant," adjudged and decreed as first hereinabove briefly described. Thereafter, upon proof of the failure of the defendant to comply with the final decree, an order dated February 8th, 1898 (referred to in the complaint as of "24th day of March, 1898"), was made, appointing a receiver of the defendant's property in New Jersey and directing the issuance of an injunction, etc. The receiver was unable to obtain possession of any of the defendant's property in New
206 Jersey, and the defendant did not comply with the decree in any respect.

The trial court decided that the plaintiff was entitled to judgment against the defendant enforcing against him the decree of the chancery court of New Jersey and further enforcing against him the order of that court which provided for the enforcement of the decree by the appointment of a receiver and by an injunction. She was held entitled to judgment against the defendant for the amount of alimony, counsel fee and costs due, or incurred, under the New Jersey decree; for the amount of alimony accrued since the decree; that he pay to her the sum of $80.00 a week from the date of the decision, as and for permanent alimony; that he give a bond in the sum of $100,000, to secure the payment of the several sums of money specified and that, upon his failure to comply with the provisions of the decision, a receiver might be appointed, ancillary to the receiver appointed by the court of chancery of New Jersey. Exceptions were filed to the decision and, thereafter, judgment was entered in conformity with the decision. The appellate division, upon the defendant's appeal, modified the judgment, so as to adjudge that the plaintiff recover of the defendant the sum of $8,840, and, as so modified, affirmed it. The amount of the recovery, as allowed by the appellate division, represents the only, and the precise, amount

of money, which the final decree of the court in New Jersey adjudged to be due and payable from the defendant to the plaintiff, at the date of its rendition. Cross-appeals were taken by the parties from the judgment of the appellate division; the plaintiff because of its modification, and the defendant because of its affirmance, of the judgment of the trial court.

James Westervelt, Henry B. Gayley and Matthew C. Fleming for plaintiff.

John H. Kemble for defendant.

GRAY, *J.*:

I think that the appellate division has very correctly decided the questions in the case and the opinion of Mr. Justice Bartlett, speaking for that court, leaves little, if anything, to be added to its reasoning. With respect to the main question, whether the court of chancery of the State of New Jersey acquired jurisdiction over the defendant to render the final decree for the payment of alimony, it is argued, in his behalf, that the decree of divorce was invalid as to him and, therefore, afforded no support for the decree of alimony. That the decree of divorce was of no force as to him cannot be disputed. It is quite settled, at the present day, that no State can exercise jurisdiction and authority over persons, or property, without its territory. Its laws and the judgments of its tribunals can have no extraterritorial operation, except so far as the former may be allowed such by comity. The decree of divorce, which the plaintiff obtained in New Jersey, was effectual to determine her status
207 as a citizen of that State towards the defendant; but as to him it effected nothing and was void for want of personal service of process, or of an appearance by him in the divorce proceedings. One, or the other, of these conditions was required to be shown to enable the court to proceed with jurisdiction *in personam*. As the service of process was constructive, by publication, however authorized by the laws of the State, it was ineffectual against the defendant for any purpose. (People *v.* Baker, 76 N. Y., 78; Matter of Kimball, 155 *ib.*, 62; Pennoyer *v.* Neff, 95 U. S., 714; Story's Conflict of Laws, sec, 539.)

This action, however, is upon a final decree of the chancery court of New Jersey, which rendered a money judgment *in personam* against the defendant in a proceeding in which there was a voluntary appearance on his part. Upon service of the order of the chancellor, directing him to show cause why the petition of the plaintiff for the amendment of the decree of divorce should not be granted, he appeared in the proceeding, without any reservation of record, and without making any objection to the jurisdiction of the court. Not only was that so, but in his affidavit, which was filed in the proceeding, he asserted that he had been divorced from his matrimonial relations upon the plaintiff's petition; that he had subsequently married again and his objections to the granting of the plaintiff's petition were carefully formulated. He alleged that "the decree for divorce * * * was purposely drawn without provid-

ing for, or reserving any alimony," etc.; that he was "financially unable to pay alimony," and "that the said decree of divorce having been made without reserving the question of alimony, and this defendant having been absolutely divorced from said petitioner by said decree, and having since formed new relations and matrimonial obligations, that it would be illegal, inequitable and unjust to now impose upon him the burden of alimony," etc. In short, he appeared and submitted himself to the jurisdiction of the court, appealing to its consideration of the facts and not objecting to its power to proceed; not repudiating the divorce, but relying upon it. There cannot be the slightest question that his appearance was general. He was represented by counsel, until the order of the chancellor, which amended the decree of divorce by reserving to the petitioner the right to apply at the foot thereof for alimony, and to the court the power to make any further order with respect thereto, had been affirmed by the court of errors and appeals, upon his own appeal, and until the application for a reference to determine the amount of alimony. Is he, then, in a position to invoke the invalidity of the original decree of divorce? As he was not personally served and did not appear in the divorce action, the decree divorcing the plaintiff could not have given her any judgment *in personam*. It did not reserve the right to apply thereafter for alimony, when jurisdiction *in personam* was obtained of the defendant; but that was an unintentional
208 omission, as the chancellor decided, which was due to the inadvertence of plaintiff's counsel and would be remedied by amending the decree. The affirmance of the order, in that respect, on defendant's appeal, settled the law of that State to be, that the court may, upon petition, amend its enrolled decree, when the amendment is necessary to give full expression to its judgment and is matter which would, without doubt, have been incorporated in the decree when made, if attention had been called to it (Lynde *v.* Lynde, 54 N. J. Eq., 473). The demand for alimony in a divorce suit is not an essential part of the cause of action; but is merely incidental to the action and the judgment (Forest *v.* Forest, 25 N. Y., 501; Galusha *v.* Galusha, 138 *ib.*, 272, 281; Lynde *v.* Lynde, *supra*). In Kamp *v.* Kamp (59 N. Y., 212) the question was not up as to whether the court might amend its judgment granting divorce, simpliciter, where the omission to reserve the question of alimony was shown to have been through inadvertence. The application there was for an order directing the payment of alimony, upon a judgment of divorce which was silent as to alimony, and it was held that the power to allow it in subsequent proceedings does not exist, in view of the legal presumption that the judgment had finally decided every question involved in the action; which would include the right of the plaintiff to claim alimony.

In my opinion, assuming, as we must, that the decree of the chancery court, which amended the original decree of divorce, expressed the law of the State of New Jersey (Laing *v.* Rigney, 160 U. S., at p. 542), jurisdiction was obtained over the defendant, by his appearance, plea and submission, to so far cure the invalidity of the divorce

decree as to render it effective as a basis for alimony proceedings. But whether its invalidity was cured, or not, in the subsequent proceeding to which the defendant was a party, a final decree was entered adjudging that he pay to the plaintiff a certain sum of money. The jurisdiction once obtained could not be divested by his refusal to appear in the later stages of the proceeding. He cannot now attack the final decree of the court collaterally after having had his day in court. In Laing *v.* Rigney (*supra*), after the wife had filed a bill against her husband in the court of chancery, in the State of New Jersey, alleging acts of adultery and the defendant had appeared and answered denying the allegations, the plaintiff filed a supplemental bill, wherein she alleged that the defendant had committed adultery with a person named, since the commencement of the suit, and prayed that she might have the same relief against the defendant as she might, if the facts had been stated in the original bill. Process upon the supplemental bill could not be served personally upon the defendant, who was a non-resident, and there was substituted service by publication. He filed no answer to the supplemental bill, nor did he appear, and a final decree was rendered by the chancellor granting the divorce and awarding alimony, etc.

An action was then brought in this State by the wife upon the
209 decree, to recover against her husband the amount awarded for alimony and costs, and the question was whether the New Jersey court had jurisdiction to render the decree. In the Supreme Court of the United States, to which the case was taken from this court (127 N. Y., 408), by writ of error, it was held that, in affirming the dismissal of the plaintiff's complaint upon the trial, due effect had not been given to the provisions of article four of the Constitution of the United States, which require that full faith and credit shall be given in each State to the judicial proceedings of every other State. It was conceded that if the judgment of the court of chancery was not binding upon the defendant therein, personally, in that State, no such force could be given to it in the State of New York; but it was held that the law of the State of New Jersey must be deemed to be as declared by the chancellor, who had rendered a final decree, based upon the original bill, the process under which had been served upon the defendant within the State, and upon the supplemental bill, a copy of which, with the rule to plead, had been served upon the defendant without the State. It was said that "so long as this decree stands, it must be deemed to express the law of the State. If the defendant deemed himself aggrieved thereby, his remedy was by appeal." In other words, the Supreme Court of the United States held that the New Jersey court having once acquired jurisdiction of the defendant in the action, whether it retained that jurisdiction, so as to render the final decree in the proceedings leading thereto, was a question depending upon the law of that State, which could not be attacked collaterally.

Laing *v.* Rigney is much in point; inasmuch as jurisdiction of the defendant, in this case, having been obtained in the proceeding, it was retained by the court until it made the final decree. The

jurisdiction conferred the power to render the decree and it will be regarded as valid and binding until set aside in the court in which it was rendered (Kinnier *v.* Kinnier, 45 N. Y., p. 542).

Ward *v.* Boyce (152 N. Y., 191) has no application. The action was upon a promissory note, made by the defendant to the plaintiff's order, and the issue between the parties was as to the plaintiff's ownership. The defendant claimed that the record of a certain proceeding in a justice's court, in the State of Vermont, was conclusive evidence that the note was not her property, but was that of her husband. The proceeding in the Vermont court was by way of trustee process and was instituted by a creditor of Mr. Ward, this plaintiff's husband, against him and Boyce, the maker of the note, as his debtor. Ward was a non-resident, did not appear and judgment went against him by default. Boyce, the other defendant, appeared and stated that he gave the note to Mrs. Ward for cattle purchased and he asked that she be cited to appear. A citation was served upon her, in the State of Vermont, to show cause why the note should not be adjudged to be held as her husband's property by his creditor. She did not appear and
210 judgment was rendered in conformity with the terms of the citation. We held that the judgment did not conclude Mrs. Ward; because she was not a party to the proceeding and was cited to appear at a stage of it, when she had no opportunity to litigate the fundamental issue. The principal fact had then been adjudged, that the indebtedness for the cattle, for which the note was given, was owing to the husband; and this in a special statutory proceeding, in which the court had acquired no jurisdiction. service of any process upon him, or upon his wife, who held the note. When she was cited, it was not that she might contest the validity of the judgment against her husband; but merely to show cause why the note she held should not be adjudged as her husband's property and to be held by his creditor. I can perceive no resemblance in the principle of the decision in Ward *v.* Boyce to that involved here.

I am satisfied, without further discussion, that the court of chancery in New Jersey had ample jurisdiction to render the final decree now in question, against the defendant.

With respect to how far the supreme court of this State will enforce the final decree of the New Jersey court, I think the determination of the appellate division to be quite correct. The action was to recover upon a final decree of the court of another State, which being rendered with jurisdiction over the person of the defendant, is to be deemed conclusive, in so far as it adjudged the defendant to be indebted to the plaintiff at the date of its rendition. The proceeding in chancery had terminated in an unconditional decree that the defendant must pay a definite sum of money, established as a debt against him, and, therefore, it had extraterritorial value and force. (Wharton, Confl. Laws, § 804.) As a debt of record against the defendant the courts of this State should give it full credit and effect; but as to its other provisions for future alimony and for equitable remedies to enforce compliance, I do not think we should say that it falls within the rule of the Federal Constitution. I do not think

that the courts of this State should give effect to the decree by enforcing any of the collateral remedies, which the prevailing party may be entitled to have in New Jersey and which the subsequent order gave to her.

So far as it made provision for the payment of alimony in the future, it remained subject to the discretion of the chancellor and lacked conclusiveness of character. The chancellor's action was not final on the subject. As he observed in Lynde *v.* Lynde (*supra*), referring to the law of New Jersey: "The statute exhibits an intention that the subject shall be continuously dealt with according to the varying condition and circumstances of the party." The provision of the Federal Constitution, which requires that full faith and credit shall be given to the judicial proceedings of another State, in my opinion, should be deemed to relate to judgments, or decrees, which not only are conclusive in the jurisdiction where rendered,
211 but which are final in their nature. If they, once and for all, establish a debt, or other obligation, against a party, the record is available in other jurisdictions as a foundation for a judgment there.

The provisions of our code for the enforcement of a direction, in a judgment of divorce, for the payment of alimony, by equitable remedies, pertain only to such judgments as are recovered here (art. IV, chap. 15). The jurisdiction of the supreme court of this State to dissolve a marriage is conferred solely by statute and its provisions upon the subject of alimony are not available to the plaintiff in aid of her decree.

The plaintiff's decree was, therefore, available to her as evidence in this action that the subject-matter of the proceedings leading to its rendition, viz., the liability for alimony, had become a debt of record in the State of New Jersey, which could not be avoided but by plea of *nul tiel* record. (McElmoyle *v.* Cohen, 13 Peters (U. S.), 311, 324.)

The case of Barber *v.* Barber (21 How. (U. S.), 582) cited by the plaintiff in support of her claim that the decree of the New Jersey court should be enforced in all its parts, was not parallel in its facts and the observations of Justice Wayne, which are referred to, if intended as supposed, were not necessary to the decision of the particular question. In that case the wife had obtained a judgment of divorce from her husband in the court of chancery of this State and the final decree awarded her a sum of money representing alimony retrospectively due to her, for the interval between the filing of the bill and the rendition of the decree; directed execution therefor and, further, ordered the payment of permanent alimony in the future, during her life, in quarterly payments, which was "vested in her for her own and separate use and as her own and separate estate, with full power to invest the same * * * to dispose of the same by will or otherwise, from time to time during her life, or at her death," etc. The husband then left this State and went to Wisconsin. A bill was filed there, in the United States court, by the wife, through her next friend, setting forth the proceedings had in the New York court and the decree; charging the husband with not having paid

any part of the alimony adjudged to his wife and alleging that there was then due to her a certain amount of money on that account. In his answer he admitted the rendering of a decree of divorce after contestation and that by it he "was subjected to the payment of alimony to the extent and in the way it is claimed in the bill," and alleged that, as he had obtained a divorce from his wife in Wisconsin, she thereby "became a *feme sole* and being so, could not sue by her next friend," etc. The action resulted in a decree, adjudging that a stated amount of money "is due from the defendant upon the alimony sued for" and, upon his default in payment, ordering execution therefor. It will be observed that the situation of the parties was quite other than here; that the decree of the New York court was the basis of a bill in equity in the Federal court and that its finality as an adjudication with respect to alimony, past due and in the future—

212 (in which latter respect it was made a vested estate in her for life)—was admitted by the answer to the bill. It will also be observed that the decree obtained in the United States court, in Wisconsin, merely adjudged a certain amount to be due complainant which the defendant must pay. The question in the case was stated to be, whether the wife might sue in another State "by her next friend, in equity, in a court of the United States, to carry into judgment the decree" and much of the discussion proceeded upon the jurisdiction in equity. As to the nature of a decree which awards alimony, it was remarked, in the course of the opinion, that when the court having jurisdiction of the wife's suit for divorce, allows her alimony, "it becomes a judicial debt of record against the husband." As Mr. Justice Bartlett very correctly suggests, in his examination of Barber *v.* Barber, Mr. Justice Wayne, when he further observed in his opinion that the wife might sue her husband in another jurisdiction, "to carry the decree into a judgment there with the same effect that it had in the State in which the decree was given," could not have intended that she could carry with her judgment into another State the right to any particular remedies for its enforcement; because that would have been in conflict with the rule which he had laid down many years earlier in McElmoyle *v.* Cohen (*supra*).

So far, therefore, as the final decree of the court in New Jersey adjudged moneys to be due and payable to the plaintiff from the defendant, it became a judicial debt of record, which the former was entitled to have enforced by the courts of this State, under the provisions of the Federal Constitution, and a judgment recovered thereupon could be executed only as our laws permit (Barber *v.* Barber, *supra*, at p. 324); which would not include the equitable remedies, provided by the statute, in the chapter on matrimonial actions. So far as the plaintiff's decree provided for methods to enforce payment, its provisions were in the nature of execution and operative upon the defendant only as he, or property belonging to him, might be found within the jurisdiction of the courts of New Jersey.

The subsequent order, dated February 8th, 1898, and which is set out in the complaint (but referred to as of March 24th, 1898), is

not enforceable here; for it was merely an order which sought to carry the final decree into execution within the State by the equitable remedies of a receivership and of an injunction. No action will lie upon such an order.

I advise an affirmance of the judgment, without costs.

Parker, ch. J., Haight and Werner, JJ., concur; Landon, J., concurs in memorandum; O'Brien, J., not voting; Cullen, J., not sitting.

Judgment affirmed.

A copy.

E. H. SMITH, *Reporter.*
C.

[Endorsed:] Lynde *v.* Lynde. Gray, J. 4.40.

213

LYNDE
v.
LYNDE.

LANDON, *J.:*

I concur in the opinion of Gray, J., in overruling the defendant's appeal. I would go further and sustain the plaintiff's appeal. The plaintiff seeks such equitable judgment in this State as shall give full faith, credit and effect to a decree of the court of chancery of New Jersey awarding her alimony against her husband. The case embraces a Federal question, and the decisions of the United States Supreme Court become authoritative so far as they are applicable. The question is not whether the jurisdiction of the courts of this State to grant alimony is equitable or statutory, but whether a plaintiff who has obtained a decree for alimony in another State can in an equitable action in this State, upon sufficient allegations and proofs, not only obtain judgment upon such foreign decree, but also such means of enforcing it as are suited to periodical payments, and the peculiar duty incumbent upon the husband in respect of alimony, which means equity alone can give. Barber *v.* Barber (21 How. (U. S.), 582) holds that equity has jurisdiction in such a case. In Wood *v.* Wood (7 Misc. Rep., 579) the court refused to follow the decision, and the appellate division has adopted the refusal. But the case there was upon a French decree, and no Federal question existed, and the court was not bound by the authority of the Barber case. It is otherwise here. If equity has jurisdiction, then it can adapt its remedies to the exigencies of the case. This the special term did, and I think did right.

A copy.

E. H. SMITH, *Reporter.*
C.

[Endorsed:] Filed May 22, 1900. W. R. D., clerk.

214 At a special term of the supreme court, Suffolk county, held in the county of Kings, at the county court-house in Brooklyn, in said county, on the 19th day of April, 1900.

Present: Hon. Samuel T. Maddox, justice.

MARY W. LYNDE, Plaintiff,
vs.
CHARLES W. LYNDE, Defendant.

This cause having been brought on upon the remittitur herein sent down from the court of appeals and now filed herewith in the county of Suffolk, by which remittitur it appears that an appeal was taken by the defendant from the judgment of this court entered herein June 16th, 1899, to the said court of appeals, and that upon such appeal the aforesaid judgment has been in all things affirmed, without costs, and that the record and proceedings had been directed by said court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals, according to law: Now, therefore, it is—

Ordered and adjudged that the judgment of the court of appeals be, and the same hereby is, made the judgment of this court, and that the plaintiff have execution against the defendant for the amount adjudged to be recovered in and by the judgment of this court aforesaid, entered the 16th day of June, 1899, and that this order or judgment be annexed to the judgment-roll.

Enter.

S. T. M., *J. S. C.*

Enter in Suffolk county.
Granted Ap'l 19, 1900.

PETER P. HUBERTY, *Clerk.*

215 [Endorsed:] Supreme court, Suffolk county. Mary W. Lynde, plaintiff, *vs.* Charles W. Lynde, defendant. Copy. Order for judgment of affirmance on remittitur from court of appeals. James Westervelt, attorney for plaintiff, 52 Wall street, New York.

216 Supreme Court, Suffolk County.

MARY W. LYNDE, Plaintiff,
vs.
CHARLES W. LYNDE, Defendant.
} Judgment of Affirmance.

A judgment in this action in favor of the plaintiff against the defendant having been rendered in this court on the 21st day of January, 1899, upon a decision of Mr. Justice Wilmot M. Smith, after a trial before him, at special term in Suffolk county, wherein and whereby it was adjudged and decreed, among other things, that the plaintiff have judgment against the defendant for the sum of $14,084.65 damages, and also for $811.38 costs and allowance adjusted in said judgment, and also that the plaintiff have certain other and further relief of an equitable nature which is in said judgment more fully set forth, and the defendant having appealed

from said judgment to the appellate division of the supreme court in and for the second judicial department, and the said judgment having been modified by said appellate division upon said appeal so as only to adjudge that the plaintiff recover of the defendant the sum of $8,840, with costs (including an extra allowance of $442), amounting to $553.38, and, as thus modified, affirmed, without costs of said appeal to either party, and judgment of modification and affirmance having been rendered thereon on the 16th day of June, 1899, and the defendant having appealed therefrom to the court of appeals, and the plaintiff having taken a cross-appeal there-
217 from to the court of appeals, and said court of appeals having sent hither its remittitur filed herein the 6th day of April, 1900, by which it appears that the said court of appeals has affirmed the said judgment of June 16th, 1899, in all things without costs, and has given judgment accordingly, and has remitted the judgment of said court of appeals to this court to be enforced according to law; and this court having by an order entered herein the 19th day of April, 1900, ordered that said judgment be made the judgment of this court without costs: Now, therefore, it is—

Adjudged that the judgment of the said court of appeals be, and the same hereby is, made the judgment of this court; and it is—

Ordered and adjudged that the judgment of the court of appeals be, and the same hereby is, made the judgment of this court, and that the plaintiff have execution against the defendant for the amount adjudged to be recovered in and by the judgment of this court aforesaid, entered the 16th day of June, 1899, and that this judgment be annexed to the judgment-roll.

218 [Endorsed:] Supreme court, Suffolk county. Mary W. Lynde, plaintiff, *vs.* Charles W. Lynde, defendant. Copy. Judgment of affirmance on remittitur from court of appeals. James Westervelt, attorney for plaintiff, 52 Wall street, New York.

219 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the supreme court of the State of New York for the second judicial department of said State, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea or suit which is in the said supreme court of the State of New York, before you or some of you, said judgment having been affirmed by the court of appeals of the State of New York, being the highest court of law and equity of the said State of New York in which a decision could be had in the said suit between Mary W. Lynde, plaintiff, respondent, and Charles W. Lynde, defendant, appellant, and the record having been remitted from said court of appeals to your court, wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of said Constitution, manifest error hath happened, to the great damage of the said

Charles W. Lynde, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid on his behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 22nd day of May, 1900, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid having been inspected, the said
220 Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 15 day of May, in the year one thousand nine hundred.

The Seal of the Circuit Court, Eastern District of New York.

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States for the Eastern District of N. Y.

Allowed by—

R. W. PECKHAM,
Associate Justice of the United States Supreme Court.

221 [Endorsed.] United States Supreme Court. Mary W. Lynde, def't in error, *vs.* Charles W. Lynde, pl'ff in error. Original. Writ of error. George S. Ingraham, attorney for pl'ff in error, 166 Montague street, Brooklyn, N. Y. Filed May 22, 1900. W. R. D., clerk.

222 MARY W. LYNDE
vs.
CHARLES W. LYNDE.

Service is hereby admitted of a copy of the order staying all proceedings in actions 2, 3, and 4 and notice of entry of same, copy bond and notice of filing same in the same actions, petition for writ of error, order allowing same, and assignments of error, writ of error, and supersedeas bond, and notice of filing of said petition, order, assignments, writ, and bond; also copy of citation, without prejudice to right to move for amendment of form of bond in Nos. 2, 3, & 4.

Dated May 15th, 1900.

JAMES WESTERVELT,
Attorney for Def't in Error.

[Endorsed:] Admission.

223 UNITED STATES OF AMERICA, *ss:*

To Mary W. Lynde, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error directed to the honorable judges of the supreme court of the State of New York, appellate division, second judicial department, and filed in the office of the clerk of said court, in the county of Kings, in said State, wherein Charles W. Lynde is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the United States Supreme Court, this 14th day of May, in the year of our Lord one thousand nine hundred.

R. W. PECKHAM, *Justice, &c.*

224 [Endorsed:] United States Supreme Court. Mary W. Lynde, def't in error, *vs.* Charles W. Lynde, pl'ff in error. Original. Citation. George S. Ingraham, attorney for pl'ff in error, 166 Montague St., Brooklyn, N. Y. Filed May 22, 1900. W. R. D., clerk.

225 Supreme Court, Suffolk County.

MARY W. LYNDE
vs.
CHARLES W. LYNDE. } Actions Nos. 2, 3, and 4.

Whereas a judgment between the same parties herein was entered in action No. 1 in the Suffolk county clerk's office on January 19th, 1899, awarding plaintiff the sum of $14,084.65 as alimony then due, counsel fee in New Jersey, interest, &c., and $811.38 as costs and allowance, which judgment enforced in this State the provisions of an alleged valid decree in New Jersey dated December 28th, 1897, awarding plaintiff alimony; and

Whereas said judgment further provided that defendant pay plaintiff eighty dollars per week alimony, and to secure the same directed defendant to give a bond of $100,000 within ten days from the service of a copy of said judgment, and in default thereof that a receiver be appointed of defendant's property, and an appeal to the appellate division, second department, was taken by defendant from said judgment, and a bond of $42,000 pending appeal was given by defendant;

And whereas on June 6th, 1899, said appellate division modified said judgment so as to adjudge that plaintiff recover $8,840 and $553.38 costs and allowance; said court struck out said provision of the judgment of the trial court which awarded plaintiff relief by way of a bond or a receiver;

And whereas an appeal to the court of appeals was taken from said judgment of the appellate division by the defendant, and a second bond in the sum of $24,000 was given by defendant;

And whereas subsequently action- Nos. 2, 3, and 4 were
225½ instituted for the recovery of the weekly alimony accrueing since the alimony awarded under said New Jersey decree by judgment of the appellate division in action No. 1, to wit, alimony from January 4th, 1898, to and including July 25th, 1899:

And whereas a motion was made for a stay of all further proceedings in this State for the recovery of alimony under said decree of the court of chancery dated December 28th, 1897, and on August 17th, 1899, said motion was granted, providing that defendant give a bond in due form for $22,500 to secure the plaintiff the payment of alimony that will accrue under said decree pending the determination in the court of appeals of the appeal in action No. 1 between the above-named parties; said bond was duly given September 13th, 1899;

And whereas by judgment entered in its clerk's office on April 6th, 1900, said court of appeals affirmed in all respects, without costs, said judgment of said appellate division, and said judgment has been made a judgment of the supreme court by judgment entered in the office of the clerk of Suffolk county on or about April 20th, 1900;

And whereas Hon. Rufus W. Peckham, associate justice of the United States Supreme Court, has allowed a writ of error from said Supreme Court of the United States to review said judgment in the United States Supreme Court:

Now, therefore, if the United States Supreme Court shall affirm said judgment entered in the office of the clerk of Suffolk county on or about April 20th, 1900, or shall dismiss said writ for want of jurisdiction, the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York at No. 35 Wall street, in the borough of Manhattan, in the city of New York, does hereby undertake that the defendant will
pay the plaintiff, to an amount not exceeding the sum of
226 $7,500, the installments of alimony, with interest due since April 6th, 1900, and to grow due in the future, under said decree of the court of chancery, until the judgment entered pursuant to the final decision of the United States Supreme Court.

Dated New York, May 12th, 1900.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
[L. S.] By HENRY B. PLATT, *Vice-President.*

Attest: JOHN W. WOOTEN, *Attorney.*

(U. S. int. rev. stamp, 10 cts., can.)

Endorsed: Filed May 16, 1900. W. R. D., cl'k.

227 [Endorsed:] Supreme court, Suffolk county. Mary W. Lynde *vs.* Charles W. Lynde. (Copy.) Bond.

228 To the Supreme Court of the United States:

In pursuance of the statute in such case made and provided, I hereby return to this honorable court a copy of the transcript of record in the case of Mary W. Lynde against Charles W. Lynde, and I do certify that the foregoing are true copies of the said judgment-roll and record as the same remain on file in the office of the clerk of Suffolk county, New York.

I also certify that I have annexed hereto the original writ of error, the original citation, with proof of service endorsed thereon, and a copy of the writ of error bond.

Witness my hand and official seal, at Riverhead, L. I., this 28th day of May, 1900.

[Seal Suffolk County.]

WM. R. DUVALL, *Clerk.*

{ Ten-cent U. S. internal-revenue stamp, canceled May 28, 1900. W. R. D., N. Y. }

Endorsed on cover: File No., 17,990. New York supreme court. Term No., 305. Charles W. Lynde, plaintiff in error, *vs.* Mary W. Lynde. Filed May 31, 1900.

229 Supreme Court of the United States.

MARY W. LYNDE, Plaintiff in Error,
vs.
CHARLES W. LYNDE, Defendant in Error. } Order Allowing Writ of Error.

Mary W. Lynde, the plaintiff in error, by James Westervelt, her attorney, having this 20 day of July, 1900, presented to the court her petition praying for the allowance of a writ of error intended to be urged by said plaintiff in error; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises:

On consideration whereof the court does hereby allow a writ of error, upon the plaintiff in error giving a bond according to law in the sum of five hundred dollars, which shall operate as a supersedeas.

Dated 20th day of July, 1900.

R. W. PECKHAM,
Justice of Sup. Ct. U. S.

230 Supreme Court of the United States.

MARY W. LYNDE, Plaintiff in Error,
vs.
CHARLES W. LYNDE, Defendant in Error.

And now comes Mary W. Lynde, plaintiff in error, and says that on the 19th day of April, 1900, the supreme court of the State of New York for the second judicial department of that State, at a special term thereof for Suffolk county, held in the county of Kings, in said State, entered judgment herein obedient to a decision of the court of appeals of said State, affirming a former judgment of like effect which was entered in said county of Suffolk on the 16th day of June, 1899, said cause having been appealed to the court of appeals aforesaid, in which judgment and the proceeding had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff in error, Mary W. Lynde, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff, Mary W. Lynde, prays that a writ of error may issue in this behalf to the honorable judges of the supreme court of the State of New York for the second judicial department of said State for the correction of errors so complained of, and a transcript of the record, proceedings, and papers in this cause may be sent to the Supreme Court of the United States.

Dated New York, July 16, 1900.

JAMES WESTERVELT,
Attorney for Plaintiff in Error,
52 Wall Street, New York City.

231 Supreme Court of the United States, of the October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-nine.

MARY W. LYNDE, Plaintiff in Error,
vs.
CHARLES W. LYNDE, Defendant in Error. } Assignments of Error.

Afterwards, to wit, on the 20th day of July, 1900, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Mary W. Lynde, by James Westervelt, her attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. That the supreme court of the State of New York, on the affirmance and direction of the court of appeals of said State, erroneously disregarded and held for naught the binding force and effect of the judgment and decree of the court of chancery of the State of New Jersey in favor of the plaintiff in error against the defendant in error, which judgment was obtained upon due appearance in court on behalf of the defendant in error and after jurisdiction duly obtained of the person of said defendant in error and of the subject-matter of the suit.

2. That the said supreme court and court of appeals erroneously failed to give such faith and credit to said judgment of the court of chancery of New Jersey as the said judgment has by law or usage in the courts of that State, contrary to the mandate of the Constitution of the United States in that behalf.

232 3. That the said court of appeals of the State of New York erred in affirming the order of the appellate division of the supreme court for the second department of said State and in not affirming the judgment of the special term of the said supreme court.

4. That the said appellate division of the supreme court of said State for the second department erred in modifying the judgment of the special term of said court and in not affirming the same.

5. That the said court of appeals and the said appellate division erred in not deciding that the said decree of the court of chancery of New Jersey for alimony, counsel fee, and costs, and directing the defendant therein to give bond, appointing a receiver of his property, and sequestrating the same; which said decree of the court of chancery was valid and enforceable in toto against the defendant in error personally in said State of New Jersey, was equally valid and binding upon him personally in the State of New York, and enforceable against him in said State in the same manner, to the same extent, and with the like equitable relief.

6. That the said court of appeals and the said appellate division erred in reducing the amount of the money judgment granted by the special term of said supreme court of the State of New York.

By reason of which before-assigned errors this plaintiff in error avers that she is being deeply damaged and aggrieved, in violation

of the first section of the fourth article of the Constitution of the United States, and the said Mary W. Lynde, plaintiff in error, prays that the said judgment of the supreme court of the State of New York entered, upon the affirmance and direction of the court
233 of appeals of said State, the 19th day of April, 1900, be modified so as to adjudge that the judgment of the special term in said cause entered on the 21st day of January, 1899, be in all things affirmed with costs.

JAMES WESTERVELT,
Attorney for Mary W. Lynde, Plaintiff in Error.

Office & P. O. address, # 52 Wall street, New York city.

234 [Endorsed:] United States Supreme Court. Mary W. Lynde, plaintiff in error, *vs.* Charles W. Lynde, defendant in error. (Original.) Order and petition for writ of error and assignments of error. James Westervelt, attorney for pl'ff in error, 52 Wall street, New York. Due service of a copy of the within — is hereby admitted. Dated New York, —— —, 189–. —— ——, attorney for —— ——. Filed July 25, 1900. W. R. D., cl'k.

235 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable justices of the supreme court of the State of New York for the second judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea or suit which is in the said supreme court of the State of New York, before you or some of you, said judgment having been affirmed by the court of appeals of the State of New York, being the highest court of law and equity of the said State of New York in which a decision could be had in the said suit between Mary W. Lynde, plaintiff, respondent, appellant, and Charles W. Lynde, defendant, appellant, respondent, and the record having been remitted from said court of appeals to your court, wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of said Constitution, manifest error hath happened, to the great damage of the said Mary W. Lynde, as by her complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid on his behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the — day of October, 1900, in the said Supreme Court to be then and there held, that, the record and
236 proceedings aforesaid having been inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court, Eastern District of New York.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 20 day of July, in the year one thousand nine hundred.

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States for the Eastern District of New York.

Allowed by—
R. W. PECKHAM,
Associate Justice of the United States Supreme Court.

July 20, 1900.

[Endorsed:] United States Supreme Court. Mary W. Lynde, pl'ff in error, *vs.* Charles W. Lynde, def't in error. Writ of error. James Westervelt, att'y for pl'ff in error, 52 Wall St., New York Filed July 25, 1900. W. R. D., cl'k.

237 UNITED STATES OF AMERICA, *ss:*

To Charles W. Lynde, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error directed to the honorable judges of the supreme court of the State of New York, appellate division, second judicial department, and filed in the office of the clerk of said court, in the county of Kings, in said State, wherein Mary W. Lynde is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 20th day of July, in the year of our Lord one thousand nine hundred.

Granted.

R. W. PECKHAM,
Jus. Sup. Ct. U. S.

July 20, 1900.

[Endorsed:] United States Supreme Court. Mary W. Lynde, pl'ff in error, *vs.* Charles W. Lynde, def't in error. Citation. James Westervelt, att'y for pl'ff in error, 52 Wall St., N. Y. city. Filed July 25, 1900. W. R. D., cl'k.

238 Supreme Court of the United States.

MARY W. LYNDE, Plaintiff in Error,
vs.
CHARLES W. LYNDE, Defendant in Error. } (5c. R. S., canceled.)

Know all men by these presents that the Lawyers' Surety Company of New York, having an office and principal place of business

at Nos. 32, 34, and 36 Liberty street, in the city of New York, county and State of New York, is held and firmly bound unto the above-named Charles W. Lynde in the sum of five hundred (500) dollars, to be paid to the said Charles W. Lynde; for the payment of which, well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal and dated the 20th day of July, 1900.

Whereas the above-named Mary W. Lynde has prosecuted a writ of error in the Supreme Court of the United States to modify the judgment rendered in the above-entitled suit in the supreme court of the State of New York for the second judicial department, at a special term thereof for Suffolk county, held in the county of Kings, in obedience to a decision of the court of appeals of said State:

Now, therefore, the condition of this obligation is such that if the above-named Mary W. Lynde shall prosecute her writ of error to effect and answer all damages and costs if she fail to make her plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE LAWYERS' SURETY COMPANY
OF NEW YORK,
By THOMAS HUNT, *2d Vice-President.*

Attest:
[SEAL.] JOEL RATHBONE, *Secretary.*

239 STATE OF NEW YORK, } ss.:
County of New York, }

On the 20th day of July, 1900, before me personally came Thomas Hunt, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the 2d vice-president of The Lawyers' Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order, and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 720, of the New York Session Laws of 1893.

[SEAL.] H. G. HINTON,
Notary Public, Kings County, N. Y.

Certificate filed in N. Y. Co.

At a stated meeting of the board of directors of The Lawyers' Surety Company of New York, held at the office of the company, Nos. 32, 34, and 36 Liberty street, in said city, on the 21st day of April, 1897, on motion, it was unanimously—

"Resolved, That the president, the vice-president, the acting president, or the second vice-president, be, and either of them is, hereby authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for or on behalf of the company, and

to attach thereto the seal of the corporation, the same to be attested by the secretary or the acting secretary."

COUNTY OF NEW YORK, *ss:*

I, Joel Rathbone, secretary of The Lawyers' Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 20th day of July, 1900.

[SEAL.] JOEL RATHBONE, *Secretary.*

STATE OF NEW YORK, *County of Suffolk,* } *ss:*

I, William R. Duvall, clerk of the county of Suffolk and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that I have compared the annexed copy supersedeas bond in Lynde *vs.* Lynde with the original filed in Suffolk county clerk's office July 25, 1900, and that it is a just and true copy of such original and of the whole thereof.

Seal Suffolk County. In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 30th day of July, 1900.

WM. R. DUVALL, *Clerk.*

{ Ten-cent U. S. internal-revenue stamp, canceled 7, 30, '00. W. R. D. }

240 [Endorsed:] Supreme Court of the United States. Mary W. Lynde, pl'ff in error, *vs.* Charles W. Lynde, def't in error. Copy supersedeas bond on writ of error. Approved July 20, 1900. R. W. Peckham, jus. Sup. Ct. U. S.

241 United States Supreme Court.

MARY W. LYNDE, Plaintiff in Error,
vs.
CHARLES W. LYNDE, Defendant in Error.

Due service of the following papers in the above-entitled action is hereby admitted, to wit, petition and order for writ of error and assignments of error, citation, writ of error, and supersedeas bond, this 24th day of July, 1900.

GEO. S. INGRAHAM,
Attorney for Charles W. Lynde, Defendant in Error.

[Endorsed:] U. S. Supreme Court. Mary W. Lynde, pl'ff in error, *vs.* Charles W. Lynde, def't in error. Admission of service. James Westervelt, att'y for pl'ff in error, 52 Wall St., N. Y. city. Filed July 25, 1900. W. R. D., cl'k.

242 To the Supreme Court of the United States:

In pursuance of the statute in such case made and provided, I hereby certify that I have heretofore, on the 28th day of May, 1900, returned to this honorable court a copy of the transcript of record of the case of Mary W. Lynde against Charles W. Lynde, in obedience to the writ of error obtained by the said Charles W. Lynde, as more fully appears by my return dated on said 28th day of May, 1900.

I also certify that I have annexed hereto the original writ of error obtained by Mary W. Lynde, plaintiff in error, the citation thereon, petition and order for writ of error, and assignments of error, supersedeas bond, and proof of service of all of the same.

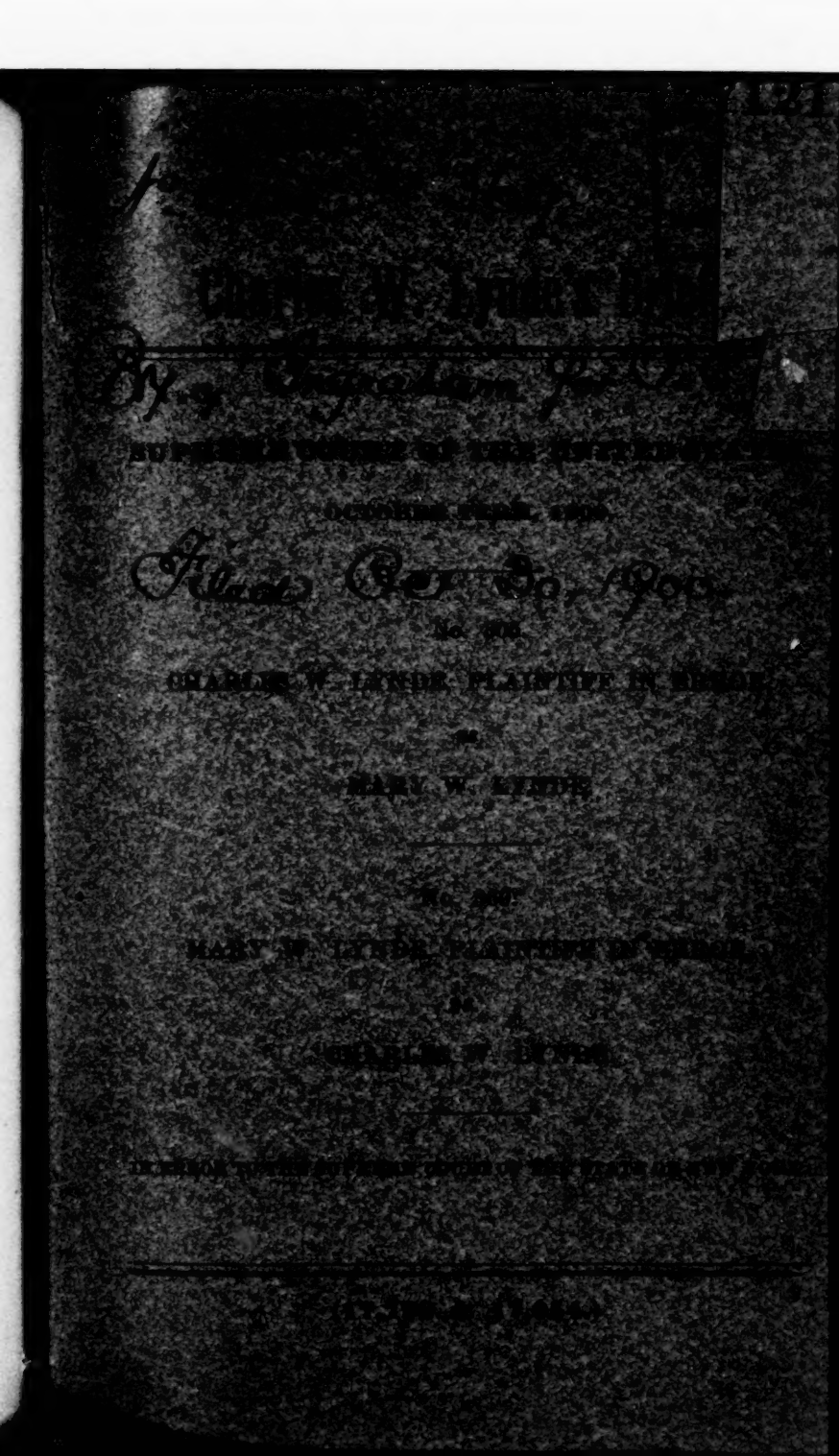
Witness my hand and official seal, at Riverhead, Long Island, this 28th day of July, 1900.

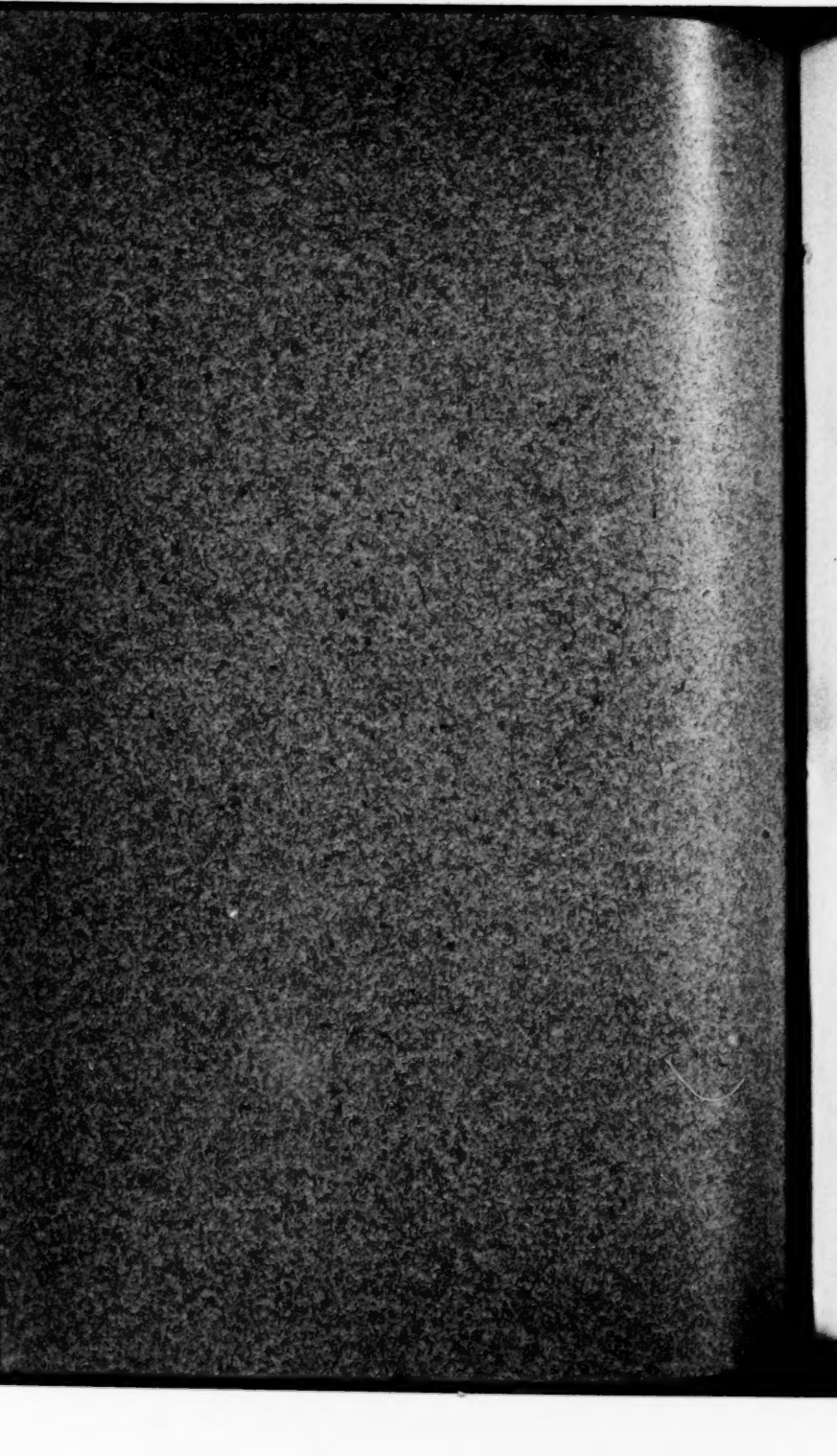
[Seal Suffolk County.]

WM. R. DUVALL, *Clerk.*

{ Ten-cent U. S. internal-revenue stamp, canceled July 28, 1900. W. R. D., N. Y. }

Endorsed on cover: File No., 17,790. New York supreme court. Term No., 305. Charles W. Lynde, plaintiff in error, *vs.* Mary W. Lynde. Filed May 31, 1900. File No., 17,854. Term No., 369. Mary W. Lynde, plaintiff in error, *vs.* Charles W. Lynde. Filed July 31st, 1900.





Supreme Court

OF THE UNITED STATES.

CHARLES W. LYNDE,
Plaintiff in Error,

vs.

MARY W. LYNDE,
Defendant in Error.

Statement.

This was an action to enforce in the Courts of the State of New York an alimony decree of the Court of Chancery of the State of New Jersey. The parties were Charles W. Lynde and his former wife, Mary W. Lynde. For purposes of convenience, hereinafter they are not referred to in their numerous legal titles, but simply as Mr. and Mrs. Lynde. The case is reported in 162 N. Y., 405, and in 41 App. Div., 280.

The New York Courts have all held that the New Jersey decree was valid; and the trial Court in that State also held that Mrs. Lynde was entitled, in New York, to the same equitable relief by way of a receivership, &c., against Mr. Lynde, as the Courts of New Jersey granted her. The New York Appellate Courts, however, overruled the Trial Court on this point, and Mrs. Lynde has come to this Court on that question.

Mr. Lynde's brief on that point immediately follows this brief. In the present brief, Mr. Lynde maintains that the alimony decree is unenforceable in every respect, inasmuch as he was thereby deprived of his property without due process of law.

Said alimony decree is based upon a concededly (Point II.) void decree of divorce in said Court of Chancery. The proceedings in New Jersey are set forth in full in the complaint in the New York action, which complaint extends through page 56 of the printed case.

The material facts are as follows: On March 25th, 1884 (page 2), Mr. and Mrs. Lynde were married in New Jersey and lived together for almost four years. At the expiration of that time they separated. In 1893 Mr. Lynde had ceased to be a resident of New Jersey, and in that year (page 60), upon service of the citation by publication, Mrs. Lynde obtained in New Jersey an absolute divorce against Mr. Lynde because of his alleged desertion. It was admitted by the complaint (page 2) in the New York action, and was uncontradicted by the testimony at the trial in that State (page 83), and is part of the findings (pages 60 and 61) that, at the time of the recovery in said Court of Chancery of New Jersey, of the original decree of divorce in 1893, Mr. Lynde was not a resident of New Jersey, and that since that time he has not been a resident of that State. It is further alleged in said complaint, and found (page 60) that Mr. Lynde was served with the summons in said New Jersey action, by publication, and that he did not appear therein prior to the decree [complaint, page 3, affidavit of Mrs. Lynde (page 13), incorporated in complaint (pages 2 and 3) and in findings (page 60), and also in the order amending the decree in New Jersey (page 37), which order is

incorporated in findings (page 61 and see page 60)].

The third paragraph (page 60) of said findings is as follows: "III. That, as defendant could not "be found within the State of New Jersey, the "process which had been duly issued pursuant to "said petition, was duly served upon said defend-"ant by publication."

In Mrs. Lynde's affidavit, just above referred to, and made a part of the complaint, it is alleged (page 13), that "the said defendant did not appear "in said cause at any time during the progress "thereof, either in person or by solicitor."

The Chancellor's opinion (page 34) and made a part of the complaint (page 8), also shows these facts, for it is there said (page 34), "When the pe-"tition was filed, the defendant was not resident "in the State, and upon proof of that fact, he was "proceeded against as a non-resident or absent "defendant. Notice was duly published and " mailed to him, which expressly declared that the " suit was for divorce from the bond of matri-" mony and for alimony." The defendant was " not served with process and did not appear in " the suit."

Mr. Lynde did not reply to the above charge of desertion for the very good reason that he was then in Australia, and did not know of the pendency of the action. His uncontradicted testimony (page 83), is as follows: "Q. When the decree of " divorce dissolving the marriage was obtained " against you, where did you live, or where were " you? A. I was in Australia. Q. Did you hear " of it before or after it was granted? A. I heard " of it after it had been decided."

It is thus apparent that Mrs. Lynde obtained an *ex parte* decree. The date (page 10) thereof is August 7th, 1893.

The decree provided (page 11), that the marriage between the parties should be dissolved, and that "the said parties, *and each of them*, are, and is "hereby freed and discharged from the obligation "thereof." In this decree of 1893 (pages 10, 11 and 60), there was no provision in any form as to alimony.

On February 10, 1896, Mrs. Lynde made a petition (pages 11 and 12) to the effect that (page 12) she had no means, and that (page 12) Mr. Lynde, at the time of the divorce and shortly prior (page 13) to the date of the petition, had no means; but that (page 12) Mr. Lynde had since inherited a fortune from his father, and that (page 12) she had intended to have the said decree of divorce so drawn that, if Mr. Lynde after the date thereof grew wealthy, she might apply for alimony; but that, through the inadvertence of her solicitor, the alimony provision was omitted.

This petition was presented to the New Jersey Court of Chancery. On February 14th, 1897, said Court (page 17), directed Mr. Lynde to show cause on February 24th, 1897, why the prayer of the petition should not be granted. That prayer was as follows (page 12): "Wherefore your "petitioner prays that your Honor will be pleased "to vacate the enrollment, open the said decree and "amend the same by decreeing that reasonable "alimony be paid to her by the defendant, and to "grant unto your petitioner a writ of *ne exeat* "*republica* issuing out of and under the seal of "this Honorable Court, to restrain the said "defendant, Charles W. Lynde, from departing "out of the jurisdiction of this Court, and that "your petitioner may have such other and further "relief as may be equitable and just."

On the return day of said order to show cause, it would seem (pages 4 and 77) that the motion

was adjourned to a later date. On said later date, and throughout this motion before the Chancellor to amend the decree, Mr. Lynde appeared by Mr. Potts, his solicitor. When Mr. Potts appeared, the testimony is undisputed that he raised the objection that no alimony could be awarded; and for the reason that Mr. Lynde had not been served with process in New Jersey, when said decree of divorce was obtained. The testimony on this point was brought out in part at the trial in New York, of the action herein to enforce in said State, the decree of the New Jersey Court of Chancery. Mr. Potts' testimony, as to raising the objection to jurisdiction is, as was said, uncontroverted. He testified as follows (page 77): "Q. Did you, "upon the order, raise any question as to the "jurisdiction of the Court? A. Yes, sir. Q. And "in what form did you raise that question? A. "On the ground that the defendant had never been "served with process, and, therefore, alimony "could not be granted for that purpose, and on "other grounds." Mr. Potts was neither contradicted nor cross-examined on this point, and the opinion of the Chancellor shows (page 35) that the question was before him.

The jurisdictional objection was overruled by the Chancellor. On the appeal in New Jersey to the New Jersey Court of Errors and Appeals, from said Chancellor's order, Mr. Lynde's attorney again raised the same objection. The first paragraph (page 39) in the petition on appeal from said order, is as follows: "Your petitioner appeals "from said order * * * upon the ground "that the same is erroneous, for that

"First. Alimony cannot be decreed after final "decree duly enrolled against a defendant who was "not served with process for appearance and did

"not appear in the original cause, and had no "property within the control of the Court."

Later, as will be shown, Mrs. Lynde sought to enforce her New Jersey decree in the State of New York. In her complaint in New York, Mrs. Lynde alleged (page 6) that the final decree of December 28, 1897, was duly made and that "said "Court of Chancery had jurisdiction of the person "of said defendant" &c. This was denied (page 57) by Mr. Lynde's answer. And at the trial in New York, exemplified copies of said decree of divorce, and the papers in the case were offered in evidence. The jurisdictional objection was then again taken as follows (pages 71 and 72).

"Defendants attorney: I object to the offer of "the papers down to and including what I shall "term the original judgment for divorce, upon the "ground of want of jurisdiction of the Court to "render that judgment; overruled; exception. "It appearing from the papers that the defendant "was neither served personally within the State "of New Jersey, or that he appeared therein, "down to the time of that judgment." * * *

Mr. Lynde, after the trial, also excepted (page 67), and generally on this point (pages 66 and 67) to the findings of the trial Court in New York to the effect that "in obedience to the order to show "cause why the prayer of the petition should not "be granted, the defendant appeared generally, "and submitted to the jurisdiction of the Court," &c. There is in the case absolutely no evidence which seeks to contradict the fact that, on each of the occasions above specified, the jurisdictional objection was duly raised. The Appellate Division in its opinion concedes that such objection was raised. Judge Bartlett, for that Court, says (page 102: "Upon the trial of the present case, Mr. Potts

"testifies that he did question the jurisdiction of "the Court of Chancery in the amendment pro- "ceeding, on the ground that the defendant had "never been served with process, and on other "grounds; and the grounds specified in his peti- "tion of appeal to the Court of Errors and Appeals "also relate to the jurisdiction of the Chancellor."

The Trial Court (pages 70 and 71), however, and the Court of Appeals in New York, in their opinions fall into the error of saying that no jurisdictional objection was raised. The Trial Court (page 71) says: "In obedience to the order to show cause "why the prayer of the petition should not be "granted, the defendant appeared and submitted "to the jurisdiction of the Court. He did not "object to the validity of the original decree."

Judge Gray, for said Court of Appeals, says (page 114): "Upon service of the order of the "Chancellor, directing him to show cause why the "petition of the plaintiff for the amendment of "the decree of divorce should not be granted, he "appeared in the proceeding, without any reserva- "tion of record, and without making any objection "to the jurisdiction of the Court." * * * "In short, he appeared and submitted himself to "the jurisdiction of the Court, appealing to its "consideration of the facts and not objecting to "its power to proceed, not repudiating the divorce, "but relying upon it." This same error appears again and again throughout Judge Gray's opinion. It will later appear, from the assignment of errors to this Court, that Mr. Lynde raises the same jurisdictional objection. Indeed, since he left the New Jersey Courts, he does, and can, from the necessity of the case, raise no other objection. And this jurisdictional objection has been insisted upon throughout from Mr. Lynde's first appearance in the New Jersey motion. It is hereafter shown

that none of the fundamental facts were ever considered by the Court, after the entry of the concededly void decree of divorce.

Mr. Potts' objections, including said jurisdictional objection, were on said motion overruled by the Chancellor, who handed down a memorandum (page 18), which directed that affidavits should be taken to ascertain whether it was Mrs. Lynde's intention to have the provision of alimony omitted from the decree of divorce, or whether such omission resulted from the inadvertence of her solicitor.

On April 15th and 29th, and on May 1, 1896, testimony (pages 18–33) on this point was taken before different Masters of the New Jersey Court of Chancery.

Thereafter (pages 33-36) in said Court of Chancery, after a review of said testimony, the Chancellor handed down an opinion in favor of Mrs. Lynde and holding that Mrs. Lynde intended at the date of the original petition to apply for alimony; and that such amendment might, according to New Jersey practice, be made *nunc pro tunc*. And, by an order granted on October 26th, 1896, the decree was so amended.

Mr. Lynde (page 38), appealed from said order to the New Jersey Court of Errors and Appeals; and on June 28th, 1897, said Court affirmed said order.

On the above motion to amend the decree Mrs. Lynde's attorney had made an affidavit that Mr. Lynde had inherited (page 12) about $525,000; but this was denied (page 41) by Mr. Lynde and (page 42) by Mr. Lynde's brother, who swore (page 42) that Mr. Lynde was unable to pay any alimony; as it was then thought that the claims of creditors against his father would exhaust the estate. So, on October 27, 1896 (the day after the granting of said Chancellor's order amending the decree by

allowing an application for alimony), a notice of motion (pages 45 and 46) was served on Mr. Potts by Mrs. Lynde's attorney, "for an order referring "this matter to a Master to ascertain and report "whether alimony should be allowed to petitioner, "and if so, how much." This motion was returnable November 2, 1896. On the return day the complaint alleges (page 6) that the motion was adjourned one week. On the adjourned day the motion was abandoned. After the Court of Errors and Appeals affirmed the Chancellor's order, Mr. Potts testifies (page 78) that a new notice of motion for an order of reference was served upon him. This second order of reference was granted (page 47) July 12th, 1897. Mr. Potts was no longer served with any notice of the different motions in the alimony proceedings, as is shown by the recitals in the Master's report (page 47) and the decree (page 51), &c. Those were served upon Mr. Lynde out of the State of New Jersey. In the answer (page 57) Mr. Lynde swore that, after the above amendment of the decree, he was not served personally, in New Jersey, with any notice or process in said action. No claim to the contrary thereof was made at the trial.

Thereafter, on December 28, 1897 (page 52) and upon the Master's report (pages 47–49) it was decreed (pages 52 and 53) that Mrs. Lynde recover of Mr. Lynde $7,840 back alimony, and $80 per week future alimony, and $1,000 counsel fee; and that upon Mr. Lynde's default in paying any of said sums, a receiver of Mr. Lynde's property might be appointed. And thereafter (pages 54–56) such receiver was appointed.

Thereafter Mrs. Lynde recovered no property in New Jersey, and brought an action, in the State of New York, to enforce the New Jersey decree. The facts above recited (except of course, those facts

which are stated to have been brought out at the trial in New York) all appear in the papers annexed to the said complaint, and made part thereof, "as if therein set forth in full." *All of said facts are admitted by the pleadings or are proved by uncontroverted evidence* And we may say in this statement, that we shall not have to repeat it in the different points, that we concede if there is conflicting evidence as to a question of fact and the lower Court has made findings, this Court will not open the question of fact; but we further claim if, as did Mr. Lynde in this case, a party "duly excepted to the findings and conclusions, it is well settled that exceptions to alleged findings of fact because unsupported by evidence, present questions of law reviewable in Courts of Error." Laing v. Rigney, 160 U. S 531 at page 540.

The above complaint in the New York action (page 2) alleged anew that Mr. Lynde had deserted Mrs. Lynde, and also that he had been intemperate and cruel to Mrs. Lynde; which allegations were denied (page 56) by Mr. Lynde's answer in that action.

We earnestly desire that the exact facts may be understood by this Court. We feel that heretofore we have been unfortunate in that the Courts of New York, with perhaps the exception of the Appellate Division, have decided this case on supposed facts, which a more thoughtful perusal of the record would not only have shown to have no existence, but also that no one has claimed that they had any existence.

To resume briefly as to the facts above set forth:

Mrs. Lynde, in 1893, obtained from Mr. Lynde an absolute divorce on the ground of desertion. Mr. Lynde was then a non-resident. At the time, he was in Australia. He was served by publica-

tion and did not know of the pendency of the action till the decree was entered. The decree made no provision in any form for alimony. In 1896, a motion was made by Mrs. Lynde, to amend the decree by allowing her to apply for alimony. Mr. Lynde appeared in opposition to this motion. We concede that he did not qualify his appearance by the technical expression, that such appearance was "for the purposes of the motion." In Point IV, however, we show that on such motion, he could, in reality, have contested nothing else. The motion was decided in Mrs. Lynde's favor. Thereafter, alimony was awarded. The following two points, and those only, were determined after Mr. Lynde's appearance, to-wit: First. Mrs. Lynde, by the New Jersey Rules of Practice, had the right to have the form of the decree amended so as to allow her to apply for alimony; and it was also decided that, in 1893, the alimony clause was omitted from the decree of divorce by inadvertence.

Second. The amount of alimony was determined.

We concede that this Court cannot review the New Jersey decree on the first point, and, if the New Jersey Courts had the right to fix any alimony, then we concede that this Court will not, of course, review the New Jersey Court's discretion as to its amount. Our claim all through the case, however, has been that the New Jersey Court was absolutely without jurisdiction to grant any alimony decree whatsoever.

These two points were determined, not at the trial, but in a proceeding long after the void fundamental decree as to the alleged desertion was entered. And, before and after said two points were determined, by his jurisdictional objection, Mr. Lynde raised his protest that he had had no opportunity to be heard on the *funda-*

mental issue, to wit: *his alleged desertion. Of this fact there is no dispute.* And there is no proof nor claim in the record that Mr. Lynde ever had his day in Court on the question of his desertion which is the only basis for the alimony decree.

It is to be noticed that in Mr. Lynde's answer, in New York, he denied the allegations of Mrs. Lynde's New York complaint, as to desertion. No confusion, however, should arise from this fact. Mrs. Lynde's said allegation as to Mr. Lynde's alleged desertion, was evidently inserted by her New York attorney, in the New York complaint, for its supposed effect upon the Court. Mr. Lynde, finding such allegation in said complaint, felt called upon to deny the same. Of course at the trial in New York, no proof was offered on this allegation. Such proof would have been utterly irrelevant, as New Jersey was the State where the action was commenced, and the Courts of that State alone had jurisdiction of the subject. The action in New York was to enforce the New Jersey decree, and not to put new provisions therein. By a familiar rule of pleading, the answer in New York to the then irrelevant allegations of desertion did not put the matter in issue. We fear that confusion, however, has arisen from this fact, as the New York Courts refer to Mr. Lynde's appearance as a general appearance; and to his arguing in the New Jersey Court of Chancery, the application to amend the decree on its merits. With an objection to jurisdiction, we concede that he may have argued the *particular application* on its merits; but nevertheless, the effect of the overruling of said jurisdictional objection was, that he never was allowed an opportunity to argue the *merits of the action.* Likewise, his so-

called general appearance was *on the motion or motions* after the void decree, and when, as above shown, he had no opportunity to be heard on the fundamental issues. We quote the Chancellor's opinion (page 68), and which opinion was even made a part (page 8) of Mrs. Lynde's own complaint in New York, as to how far Mr. Lynde could be heard on the merits of the action, after his said appearance. The Chancellor overruled Mr. Lynde's jurisdictional objection; and, after hearing the testimony as to Mrs. Lynde's intention as to alimony, said (page 37), "*The decree will be amended without "being opened.*" The amendment to which the Chancellor referred was of course the provision allowing an application for alimony. And yet, in the Court of Appeals of New York, Judge Gray says (page 116): Mr. Lynde "cannot now attack the final decree of the Court collaterally, after having had his day in Court," though as we have seen, notwithstanding Mr. Lynde's jurisdictional objection, he never had his day in Court on the merits of the action.

At the trial in New York Mrs. Lynde's attorney called an expert on New Jersey law. The testimony in our case relates largely to a legal discussion as to the enforceability of the alimony decree. In view of this fact, we here give, as appears from the evidence, Mrs. Lynde's attorney's theory of the case. We have thought it proper in the same connection to give the theory of the different New York Courts and a summary of our own theory of the case, though of course we shall reserve for the points our full discussion of the legal propositions.

Mrs. Lynde's attorney's theory of the case:

The expert called by Mrs. Lynde's attorney con-

ceded that the original decree was void, but his idea was, because the form of the decree was amended and at that time Mr. Lynde appeared by Mr. Potts and put in the so-called general appearance, that therefore the decree was enforceable. In other words, as Mrs. Lynde's attorney had coaxed Mr. Lynde within the jurisdiction of the Courts of New Jersey, those Courts could take his property away without due process of law. They could decline to give Mr. Lynde an opportunity to be heard on the fundamental issue, as they did in this case, and Mr. Lynde would be bound by the order. So far this theory has prevailed.

In support of these statements as to our adversary's theory we quote from the testimony:

At the trial in New York Mrs. Lynde's said expert as to the law of New Jersey testified (page 72) that he was a Master in Chancery in New Jersey and that he had examined the proceedings in this case, and that by the law of New Jersey, if (page 73) the decree of divorce in this case had originally reserved the question of alimony, under the New Jersey law Mrs. Lynde could not have recovered alimony if Mr. Lynde was not served in New Jersey, or did not appear. Then (page 74) said expert was asked: "Q. Do you mean to say that if that had "been in the original judgment, that the plaintiff "then could have proceeded against this defendant, "whether he was personally served within the "State or appeared therein? A. No, sir, he could "not; I have already answered that. Q. So the fact "upon which you base your opinion that this de-"cree is effective in the State of New Jersey, and "would operate against the property of this de-"fendant is upon the ground that the defendant "appeared upon the application which resulted in

"this order amending the decree? A. Yes, sir." On cross-examination said expert testified (pages 74 and 75). "Q. Now, you have been asked about "the order being made *nunc pro tunc*, do you "mean that the consequence of the defendant ap- "pearing after that amendment--suppose he ap- "pears to resist the motion and the result of the "motion is as I have stated, do you mean to say "that the Court by simply adding the words that "it may be dated *nunc pro tunc* thereafter makes "his appearance binding upon him for subsequent "applications when it would not have been other- "wise? A. I mean to say that where this order "is made *nunc pro tunc* and he appears in that "action, the Court obtains jurisdiction. Q. Do "you mean if he appears prior to that? A. No, "sir. Q. Do you mean to say that if he appears "subsequent to the order making it *nunc pro tunc*? "A. If he appears subsequent to the original de- "cree. Q. Do you mean to say that where the "application is made, as in this action, for ali- "mony, and the Court makes an order that the "decree be amended *nunc pro tunc*, do you mean "to say that his appearance to resist that motion "gives the Court jurisdiction? A. Yes, sir."

Mrs. Lynde's attorney (page 75) showed his theory of the case by propounding this question: "Q. If the amendment took the effect, *nunc pro* "*tunc*, would not the appearance to an application "for alimony, made at any time after the making "of the decree, bring the defendant within the "jurisdiction of the Court? A. Why certainly it "would."

Oddly enough, when Mrs. Lynde's attorney, after the trial in New York, drew his decison for judgment in that State, he took as a basis for said decision the finding in the concededly void original decree of divorce, that (page 60) Mr.

Lynde "had been guilty of wilful and obstinate "desertion of the plaintiff during the term of two "years or more next before the exhibiting or filing "of her said petition." And of this decree, as we shall show later, Judge Gray, in the Court of Appeals, said that "it was ineffectual against the de- "fendant *for any purpose.*"

The New York Trial Court's (pages 70, 71) theory:

This Court (page 71) said Mr. Lynde "did not "object to the validity of the original decree." * * * "He did not object to the jurisdiction of "the Court to entertain the application." On this point the Court was mistaken (see *supra*). That Court also said Mr. Lynde "recognized the validity "of the divorce by remarrying." This suggestion we answer in Point VI, where we show the doctrine has been repudiated by the Court of Appeals of New York.

The New York Appellate Division's theory of the case:

Judge Bartlett, for this Court, admits (page 101) that the original divorce was void, and (page 102) that the jurisdictional objection was duly taken; and says or implies (page 102) that it would have been fatal if Mr. Lynde had confined himself to this objection. As he raised other points, on Judge Bartlett's theory, he lost the benefit of said objection. This suggestion is answered in Point V.

The New York Court of Appeals' theory.

The first sentence (page 114) of this opinion is to the effect that the case might well be decided on Judge Bartlett's opinion. Yet, as we have seen, *supra*, in Judge Bartlett's opinion, it is conceded

that the jurisdictional objection was duly taken, while in Judge Gray's opinion it is said that such objection was not raised.

Judge Gray (page 114) says that the decree of divorce "was ineffectual against the defendant for any purpose." It is not said or implied in this portion of the opinion that the merits of the fundamental action were ever validly settled. As we understand Judge Gray, it is not necessary that they should be, for (page 116) he says: "But "whether its invalidity was cured or not, in the "subsequent proceeding to which the defendant "was a party, a final decree was entered adjudging "that he pay to the plaintiff a certain sum of "money."

It seems thus to be claimed that by some magic Mr. Lynde's alleged general appearance on a motion after judgment relates back in point of time, and, despite his jurisdictional objection, does away with the necessity for a hearing on the fundamental issue of the case.

We show in Point VII how we think that Judge Gray has misapplied Rigney v. Rigney to this case. We have pointed out, *supra*, how Judge Gray has erroneously said that Mr. Lynde made "no objection to the jurisdiction of the Court" to award alimony. The learned Judge, however, made an even more serious error. He seeks in one portion of his opinion (page 117) to give the impression that Mr. Lynde had a hearing on the fundamental issues; for, in Ward v. Boyce, 152 N. Y., 199, there was, as in this case, an original judgment and an ancillary judgment, and the defense was, as we shall show more at length in Point III, that the defendant had no opportunity to defend before the original judgment or at any time thereafter. This was precisely the situation in our case.

It will be remembered that Mr. Lynde was served by publication and was in Australia during the pendency of the fundamental action, and did not hear of it until after the decree was entered. Indeed, the lack of such opportunity has been the great bulwark of the defense (see answer, pages 56 & 57). Again and again in previous briefs, and in this brief, have we pressed it upon the Court's attention. Of the fundamental decree, let us repeat what Judge Gray himself said in an earlier part of the opinion: "The decree of divorce which the plaintiff obtained in New Jersey"* * * "was ineffectual against the defendant for any purpose." Again (page 114), Judge Gray says: "It was void for want of personal service of process, or of an appearance by him in the divorce proceedings."

He then proceeds to show how Mr. Lynde was heard on the motion to amend the decree. Not a scintilla of evidence was quoted or could be quoted to show that Mr. Lynde was heard on the fundamental issue of the action, to wit: the question as to whether he was guilty of desertion. That question was settled by that decree, which Judge Gray says "was ineffectual as against the defendant for any purpose." Of that decree the Chancellor said (page 37), at the granting of the motion to insert an alimony provision, "*the matter of the amendment will not disturb the divorce. The decree will be amended without being opened.*" This was said, it will be recalled, after the Chancellor had overruled a jurisdictional objection whereby Mr. Lynde pointed out the invalidity of the basal decree.

Notwithstanding these facts, Judge Gray, in the strongest terms, implies that Mr. Lynde had a hearing on the fundamental issue. For, after citing the facts of Ward v. Boyce, Judge

Gray, in attempting to distinguish that case from the present case (page 117), says: "We held "that the judgment did not conclude Mrs. Ward, "because she was not a party to the proceeding "and was cited to appear at a stage of it when she "had no opportunity to litigate the fundamental "issue. The principal fact had then been adjudged, "that the indebtedness for the cattle, for which "the note was given, was owing to the husband."

These remarks, in this connection, have no meaning, unless they imply that in our case Mr. Lynde was, as Judge Gray puts it "cited to appear at a stage" when he "had an opportunity to litigate " the fundamental issue."

Judge Gray has said (p. 115) "In short, he" *i. e.*, Mr. Lynde, "appeared and submitted himself to "the jurisdiction of the Court, appealing to its "consideration of the facts and not objecting to its "power to proceed; not repudiating the divorce, "but relying upon it. There cannot be the slighest "question that his appearance was general."

The facts are, as we have seen, that Mr. Lynde's jurisdictional objection was at all times raised and that (Point IV) there was no chance for a general appearance, for Mr. Lynde was not afforded an opportunity to be heard on the fundamental issue. We submit that Judge Gray has not been writing about a state of facts that make his remarks pertinent to our case.

We concede that, if the facts of this case were as Judge Gray has assumed them to be, *i. e.*, that we were heard on the fundamental issue (or had an opportunity to be heard thereon), there is no question as to the correctness of his conclusions. With respect, we say that there is in this case no warrant for his assumption of the facts. If Mr. Lynde were heard *on the merits of the action*, why was

Judge Bartlett careful to say that he was heard on the *merits of the particular application.*

Our apology for these extended remarks is, first, that we felt that we could not safely pass unnoticed the suggestion that we were heard on the fundamental decree and, second, we desired in Point III to break the force of the fact that the New York Courts have decided against us, by liberal extracts from the strong opinion of Judge O'Brien, who wrote for the New York Courts in a case which is a twin brother to our case. We know that Ward v. Boyce does not control this Court. We believe, however, that the strong reasoning of the opinion therein will impress this Court.

And we say, with the fullest confidence, that no Court which grasps the admitted facts of this case can reconcile the opinion herein of the Court of Appeals and the opinion in Ward v. Boyce. If our case was decided correctly, then Ward v. Boyce was decided incorrectly. And there is no question but what Ward v. Boyce involved a United States Constitutional question, for the Courts of New York in that case refused to enforce a judgment which had been recovered in a Court of Vermont; and so that case directly involves the national constitutional question, as to giving full faith and credit to the judgment of a sister State.

Mr. Lynde's theory of the case.

The original decree of divorce which had no alimony provision, was and is void (Point II), so far as it can be used as a basis for a judgment *in personam.* The resistance of the application to amend the form of the decree in respect to alimony could not (Point III) galvanize this void decree into life. Especially is this true, when Mr. Lynde,

by his jurisdictional objection, called the Court's attention to the fact that he had never had his day in Court on the fundamental issue. As a rule, if a party appears in an action, as the New York Courts contend, he is bound by the decree therein. This rule, however, presupposes that he will have an opportunity for a hearing on the essential issues.

In the present action, jurisdiction is, as we have seen, not claimed until the ancillary motion was made and by fixing alimony, upon the void decree said Court has not afforded Mr. Lynde an opportunity to be heard on the fundamental issue—indeed, by overruling his jurisdictional objection, has declined to hear him on those issues. The result must be, if said Court ever had any jurisdiction, that said Court thereby lost it and (Point III) that the alimony decree is void. Indeed the complaint itself (page 35) says no alimony can be awarded apart from a divorce. And so does the testimony of Mrs. Lynde's expert (page 73). The test (Point III) of the validity of a decree is, has the party had an opportunity to be heard on the essential issues thereof, therein settled. Unquestionably Mr. Lynde has not had this opportunity. The question herein is thus quite distinct from the question in that line of cases which holds that, if a party appears generally before the issues are settled, he will seek in vain to withdraw from the case and take the Court's jurisdiction with him. The test (Point III) of the validity of the decree, is not as the New York Courts imply—has a party touched his finger to the outside of a void decree, by resisting an application to amend the form thereof. By such ruling, Mr. Lynde has not had an opportunity to prove what he has sworn in his answer (pages 56 and 57) he can prove, to wit.: that Mrs. Lynde,

on the merits, is not entitled to either a divorce or alimony. We think that the true test is epitomized by Mr. Freeman in his Work on Judgments Section 118, Vol. 1, where he says:

"According to the reasoning of the Supreme "Court, the issue and service of process is equival- "ent to a direction to the defendant to appear and "present his defense for the consideration of the "Court; and its refusal, after he does appear, to "hear him or permit him to assert his rights is, in "legal effect, a revocation of its process, and there- "fore it has no other jurisdiction over him than it "had prior to the issuing of such process."

Again it will be recalled that no valid process was issued against Mr. Lynde until the motion was made to amend the form of the decree, but not to disturb the decree.

Mr. Lynde's second marriage (Point VI) has no bearing on the *in personam* decree that has been awarded against him without a hearing.

Assignments of Error.

SUPREME COURT OF THE UNITED STATES.

CHARLES W. LYNDE,
Plaintiff in Error,

vs.

MARY W. LYNDE,
Defendant in Error.

The plaintiff in error in this action, in connection with his petition for a writ of error, makes the following assignments of error, which he avers occurred upon the trial, hearings, proceedings and determination of the cause by the Special Term of the New York Supreme Court, and by both the Appellate Division, Second Department, of said Court and the Court of Appeals of said State, to wit:

I. The Supreme Court of the State of New York, at its Special Term and in its Appellate Division, and the Court of Appeals of the State of New York erred in holding and deciding that a judgment or decree of the Court of Chancery of the State of New Jersey, in favor of the defendant in error and against the plaintiff in error, for an absolute divorce obtained without personal service upon, or appearance by, the plaintiff in error in said action, would sustain a judgment *in personam* against him upon a subsequent application in said action for alimony. The said plaintiff in error never having had his day in court in respect to the matters upon which said judgment or decree of divorce was granted.

II. The said Courts in the State of New York erred in holding and deciding that the Court of Chancery of the State of New Jersey had jurisdiction of the plaintiff in error upon the application for the allowance of alimony and the determination thereof after the attempted amendment of said decree, in which proceeding alimony was granted the defendant in error without personal service upon the plaintiff in error within the State of New Jersey or appearance by him.

III. That said Courts in the State of New York erred in holding and deciding that the appearance of the plaintiff in error herein to resist the application for alimony in the action in the Court of Chancery of New Jersey after the decree of divorce therein was a general appearance, and as such was the equivalent of and a substitute for personal service of original process upon which a personal judgment could be rendered against said plaintiff in error.

By reason of which before-assigned errors this plaintiff in error avers he is being deeply damaged and aggrieved in violation of the provision of the Constitution of the United States, which ordains that no person shall be deprived of his property without due process of law.

And the said Charles W. Lynde, plaintiff in error, prays that the aforesaid judgment and determination may be reversed, annulled and altogether held for nothing.

Dated Brooklyn, N. Y., April 18th, 1900.

GEORGE S. INGRAHAM,
Attorney for Charles W. Lynde,
Plaintiff in Error,
166 Montague Street,
Brooklyn, N. Y.

POINT I.

The power of this Court to review the constitutional question involved in the judgment of the lower Courts is manifest.

A jurisdictional defense is a constitutional defense. The two words are synonymous. (Black's Law dictionary, see "jurisdiction." Winfield's Adjudged Words and Phrases, page 343.) Our jurisdictional defense was set up in the answer. It has throughout been pressed upon the attention of the Court (Statement pages 5 & 7). Practically, it has been our sole defense. To verify this statement, we cite the opinions of the Court. The New York Trial Justice (page 70) said, "The de-"fendant claims that that part of the decree award-"ing alimony was not based upon personal service "upon him or upon his appearance by a solicitor, "and that it is not binding upon him personally "in the State of New Jersey, and hence not en-"forceable in the State of New York."

Judge Bartlett, for the New York Appellate Division (page 101), says, "The defendant's ap-"peal raised two important questions: (1) Had "the Court of Chancery in New Jersey jurisdiction "to render the judgment for alimony against the "defendant?"

Then Judge Bartlett said that if this be so, the second question arises as to the form of relief to which Mrs. Lynde would be entitled. He discussed no other question. Judge Gray in the Court of Appeals said (page 114): "With respect "to the main question, whether the Court of "Chancery of the State of New Jersey acquired "jurisdiction over the defendant to render the "final decree for the payment of alimony, it is "argued, in his behalf, that the decree of divorce

"was invalid as to him and, therefore, afforded no "support for the decree of alimony." On that point Judge Gray cites United States authorities. He discusses at length Laing v. Rigney, 160 U. S., 531, a case which involved questions similar to those raised herein, and of that case Judge Gray says (page 116), it "is much in point." To prove that herein, United States Constitutional questions were raised, we may thus refer to the opinions of the New York Courts.

In O'Neil v. Vermont, 144 U. S., 323, at page 332, as a matter of fact this Court did, for this purpose, refer to the opinion. In Philadelphia Fire Association v. New York, 119 U. S., 110, this Court, for the same reason, examined the opinion of the Court of Appeals of this very State of New York. In Pittsburger and I. Co. v. Cleveland I. M. Co., 178 U. S., 270, Justice McKenna, to show the grounds of the decision, considers the opinion at length. In Sully v. American National Bank, 178 U. S., 289, it was urged, as the plaintiff in error did not raise the constitutional point till he reached the highest State Court, that he was too late, but this Court through Justice Peckham, said at page 298, "In regard to the objection that "even Carhart has raised the question too late, we "think it is without foundation; he raised it in "the Supreme Court and that Court decided it."

We have seen above that in the present case the highest Appellate Court in New York was controlled by Laing v. Rigney (160 U. S., 531). This fact alone is sufficient to induce this Court to review the lower judgment.

Yet in our case, as said, the question was raised throughout. It was set up in the answer. The complaint alleged (page 6) "that the said Court of "Chancery had jurisdiction of the person of the "said defendant." This the answer (page 57) de-

nied. In the third allegation of the said answer it is said (page 57): "Third. For a first separate "defense, defendant alleges that no process was "served upon him in the action mentioned in the "complaint, nor was the defendant at the time "when said action was commenced, or at any time "thereafter, a resident of the State of New Jersey, "and he alleges that the Court making such pre-"tended judgment or decree granting a divorce "had no jurisdiction over this defendant."

For a second, separate defense, defendant alleges:

"That he never appeared in person or by at-"torney in the said action referred to in said com-"plaint, except specially to resist the plaintiff's "motion to amend the judgment or decree therein "also referred to in said complaint, and which said "motion resulted in an order or decree amending "the said judgment or decree in said action by "adding thereto as follows" (quoting amendment):

"Nor did he in any manner authorize any other "or further appearance; and that he was not "thereafter either personally served with any "notice or process in said action in the State of "New Jersery, nor did he appear in any further "or subsequent proceedings in said action, either "in person or by attorney."

By said allegation we referred to the United States Constitution. The opinions herein show that the Courts so understood us. It is capable of demonstration that in reason we could have referred to no other. There are but three constitutions that need be considered, to wit, the New Jersey, the New York and the United States Constitutions.

First. Mr. Lynde could not have referred to the

Constitution of the State of New Jersey, for the Courts of New York require that the Constitution or the laws of a sister State must appear in the record, or they will not take judicial notice of them. Pacific Pneumatic Co. v. Wheelock, 80 N. Y., 278; Hunt v. Johnson, 44 N. Y., 27.

Moreover, the United States Supreme Court, in a case of this kind, will take no judicial notice of the laws of the State of New Jersey, inasmuch as the appeal is not from a judgment of the Courts of New Jersey, but from a judgment of the Courts of New York. Hawley v. Donoghue, 116 U. S., 1 at page 5.

New Jersey Courts are, of course, the ultimate tribunals for decisions of questions under the New Jersey law. If we had been sufficiently in error, in this New York action to rely on that instrument, one would expect us to plead the same. If the Courts in New York considered that instrument, one would likewise expect to see in their opinions some discussion of cases arising thereunder. There is none.

Second. The answer of Mr. Lynde, in New York, could not have referred to the Constitution of the State of New York for the following reason: The original decree was obtained in New Jersey, and so it was immaterial what the constitution of the State of New York required, inasmuch as if the decree was enforceable in New Jersey, under the United States Constitution, then it should be enforced in New York no matter what the local laws of that State may be. Crapo v. Kelly, 16 Wall, 610, 619. Black on Judgments, Secs. 856, 857.

Third. There is left only the Constitution of the United States, that the answer could refer to. Of that Constitution the New York Courts take judicial notice. Abbott's Trial Brief on the Facts,

Sec. 384 Indeed, they must take cognizance of such Constitution. Bridge Proprietors v. Hoboken Co., 1 Wall, 116.

If the proposition were sound—which we shall show is not the case—that the United States decisions required that for a party to avail himself of the United States Constitution, he must plead it, it is submitted that we have complied with the rule for this reason.

This Court leaves to the State Court authority to prescribe in what manner constitutional defenses or any other defenses are to be pleaded.

Commercial Bank v. Rochester, 82 U. S., 639.
Hill v. Mendenhall, 88 U. S., 453.
Hardy v. Johnson, 68 U. S., 37.

By his answer Mr. Lynde pleaded those facts which showed that the provisions of an instrument of which (*supra*) the Courts of that State take judicial notice, had been violated. It is the rule in New York, as it is elsewhere, if you plead the facts, it is not necessary to plead the law.

Springer v. Dwyer, 50 N. Y., 19.
Van Brunt v. Day, 81 N. Y., 251.
Abbott's Trial Brief on the Facts, Sec. 384.
Hawley v. Donoghue, 116 U. S., 1.

Inasmuch, then, as questions of pleading are left to the New York Courts, and inasmuch as upon the facts we have pleaded, those Courts decided the Federal question, it is submitted that in effect we have pleaded the United States Constitution.

Mr. Lynde invoked the aid of the United States Constitution again at the trial in New York when he objected to the decree of divorce as follows (pages 71, 72):

"Defendant's Attorney: I object to the offer of "the papers down to and including what I shall "term the original judgment for divorce upon the "ground of want of jurisdiction of the Court to "render that judgment.

"Overruled; exception.

"It appearing from the papers that the defend- "ant was neither served personally within the "State of New Jersey, or that he appeared therein, "down to the time of that judgment."

Still, as the only question in the case was a question under the United States Constitution, and as the lowest Courts must of necessity, in order to reach the judgment they did reach, pass on a provision of that instrument, the right to review that judgment resides in this Court.

In the case of Furman v. Nichol, 8 Wallace, 44, the Court said: "It is enough for the purpose of "this suit, to say that a cause can be removed from "a State Court into this Court under the 25th Sec- "tion of the Judiciary Act of 1789, whenever some "one of the questions embraced in it was relied "upon by the party who brings the cause here; when "the right he claimed it gave him, was denied to "him by the State Court. It is urged that the par- "ticular provision of the Constitution which the "plaintiffs in error say have been violated in its "application to their case, should be contained in "the pleadings, but this is in no case necessary. "If the record shows either by express averment "or by clear and necessary intendment, that the "Constitutional provision did arise, and that the "Court below could not have reached the con- "clusion it did reach without applying "it to the case in hand, then the jurisdiction of "this Court attaches. And it need not appear

"that the State Court erred in its judgment. It is "sufficient to confer jurisdiction that the question "was in the case, was decided adversely to the "plaintiff in error, and that the Court was in- "duced by it to make the judgment which it did."

In the case of Bridge Proprietors v. Hoboken Company, 1 Wall 116, at page 142, the Court said: "It is objected, however, by the defendants, that "the pleadings did not in words say that the "statute is void because it conflicts with the "Constitution of the United States, and did not "point out the Special clause of the Constitution "supposed to render the act invalid. It would be "a new rule of pleading and one altogether super- "fluous to require a party to set out specially the "provisions of the Constitution of the United "States on which he relies for the action of the "Court in the protection of his rights. If the "courts of this country, and especially this Court "can be supposed to take judicial notice of any- "thing without pleading it specially, it is the "Constitution of the United States; and if the "plaintiff and defendant, in either pleadings, make "a case which necessarily comes within the pro- "visions of that instrument, this Court surely can "recognize the fact without requiring the pleader "to say in words, 'This part of the Constitution is "the one involved in this case.'" This case is cited with approval by Justice Peckham as late as 177 U. S., 66 at page 77.

In Green Bay Canal Company v. Patten Paper Co., 172 U. S., 68, the same case was again cited with approval, and it was shown that the statement in an intervening case was erroneously interpreted to have modified said case. In said case in 172 U. S., at page 68, Judge Shiras said, "No particular "form of words or phrases has ever been declared "necessary in which the claim of Federal rights

"must be asserted. It is sufficient if it appears "from the record that such rights were specially "set up or claimed in the State Court in such man- "ner as to bring it to the attention of that "Court. 'The true and rational rule' this "Court has said in Bridge Proprietors v. Hoboken "Co., 1 Wall. 116, at 143, 'is that the Court "must be able to see clearly from the whole record, "that a certain provision of the constitution or Act "of Congress was relied on by the party who brings "the writ of error, and that the right thus claimed "by him, was denied.' In Roby v. Colehour, 146 "U. S. 153, 159, it was said that, 'our jurisdiction "being invoked upon the ground that a right or "immunity specially set up and claimed under the "Constitution or authority of the United States "has been denied by the judgment sought to be "renewed, it must appear from the record of the "case, either that the right so set up and claimed "was expressly denied or that such was the neces- "sary effect in law of the judgment.' If it appear "from the record by clear and necessary intend- "ment that a Federal question must have been "directly involved, so that the State Court could not "have given judgment without deciding it, that will "be sufficient. Powell v Brunswick County, 150 U. "S. 433 at 440; Sayward v. Denny, 158 U. S. 180; "Chicago Burlington &c., R. R. v. Chicago, 166 U. "S. 226."

To the same effect,

Broughton v. Exchange Bank, 104 U. S. 427:

Dugger v. Bocock, 104 U. S. 603:

Kankauna Co., v. Green Bay Co., 142 U. S. 254.

Likewise the following Works of Practice:

Jurisdiction of the United States Courts by Curtis at pages 35, 40 and 58. This author, as is well known, was *amicus curiae* in Murdock v. City of Memphis, 87 U. S. 590, which case was considered by this Court for nearly two years and settled points of practice as to obtaining writs of error from State Courts.

Foster's Federal Practice (2d Ed) page 1003;
Phillip's on United States Practice, page 179.

In McCullough v. Virginia, 173 U. S. 102 at page 119, Judge Brewer cities the Bridge Proprietors case, and says, "They establish, as far as prece-"dents can establish anything, that it is not neces-"ary to state in terms on the record that the Con-"stitution or law of the United States was drawn in "question. It is sufficient to bring the case within "the provisions of the twenty fifth section of the "Judiciary Act, if the record shows that the Con-"stitution or law, or treaty of the United States "must have been misconstrued, or the decision "could not have been made."

We know that it is sometimes said by this Court that at a trial, a party, by a constitutiona objection, is supposed to be relying on the Constitution of his State. Such remarks do and must refer to those cases where there are in a case Constitutional questions and also questions that involve general principles of law; and second, where the aggrieved party comes directly to this Court from the State where the action was originally tried. We have seen that the Courts below have said that herein only Constitutional questions were raised. Again, Mr. Lynde was sued originally in New Jersey. Neither party came to this Court from the Courts of that State. Mrs. Lynde, however, brought an action in the State of New York against Mr. Lynde. It is thus apparent

that Mr. Lynde's only defense in New York was under the United States Constitution. And it is such questions which we raised in the lower Courts, and in relation to which we are now in this Court. Indeed, we believe that no case can be found where the United Stated Constitutional question were raised by the answer, as it was herein, and this Court declined to hear the question.

To ascertain whether the lower Courts had jurisdiction, this Court may review the lower judgment to the full extent.

In Dewey v. Des Moines, 173 U. S., 193, at page 204, it was said: "A State can no more subject to its "power a single person or a single article of prop- "erty, whose residence or legal status is in another "State, then it can subject all the citizens or all "the property of such other State to its power."

In Thompson v. Whitman, 85 U. S., 457, the syllabus says: "Neither the Constitutional pro "vision, that full faith and credit shall be given "in each State to the public acts, records and "judicial proceedings of every other State, nor the "act of Congress passed in pursuance thereof, pre- "vents an inquiry into the jurisdiction of the "Court by which a judgment offered in evidence "was rendered.

"The record of a judgment rendered in another "State may be contradicted as to the facts neces- "sary to give the Court jurisdiction; and if it be "shown that such facts did not exist, the record "will be a nullity, notwithstanding it may recite "that they did exist."

Also Reynolds v. Stockton, 140 U. S., 254.

POINT II.

The original basal decree of divorce was, and is, void as against Mr. Lynde, for want of jurisdiction.

It was shown in the statement (page 3) that in 1893, Mr. Lynde was in Australia when Mrs. Lynde obtained her divorce, and that Mr. Lynde was served by publication, and that he did not know of the action till after the decree was entered, and that no one assumed to appear for him.

By reason of these facts, as against Mr. Lynde, the fundamental decree is void. At all events, this must be true so far as such decree can be used as a basis of an *in personam* alimony decree. This may be shown in a variety of ways.

In the Chancellor's opinion, annexed to the complaint, and (page 8) made a part thereof, he says (page 35): "As the decree was against the absent "defendant, who was not served with process, did "not appear in the case, and did not have prop- "erty which was under the Court's control, it "could not have given alimony. A judgment *in* "*personam* in favor of the wife, (Brown on Juris- "diction, Sec. 11; 2 Bishop, M. D., & S., Sec. 844; "Brown on Divorce, 267)."

At the trial in New York, Mrs. Lynde called as an expert on New Jersey law an attorney who (page 73) had been associate counsel with Mrs. Lynde's New York attorney in the New Jersey action, and who (page 73) had examined the New Jersey judgment roll and decree. He testified as follows:

"Q. Now, if this clause reserving the question "of alimony which was subsequently inserted in "the judgment, had originally been in that judg- "ment, under the law of New Jersey, could the

"plaintiff have recovered alimony in New Jersey "against the defendant if he neither appeared or "was served within the State? A. No, sir; he "could not."

The Appellate Division, on the appeal herein in New York, has (page 101) said that this decree was void. So has the New York Court of Appeals.

Judge Gray, for that Court (page 114) says: "That the decree of divorce was of no force as to "him," *i. e.*, Mr. Lynde, "cannot be disputed. It "is quite settled, at the present day, that no State "can exercise jurisdiction and authority over per- "sons, or property, without its territory. Its laws, "and the judgments of its tribunals, can have no "extra-territorial operation, except so far as the "former may be allowed such by comity. The de- "cree of divorce, which the plaintiff obtained in "New Jersey, was effectual to determine her status "as a citizen of that State towards the defendant: "but as to him, it affected nothing, and was void "for want of personal service of process, or of an "appearance by him in the divorce proceedings. "One, or the other, of these conditions was re- "quired to be shown to enable the Court to pro- "ceed with jurisdiction *in personam*. As the ser- "vice of process was constructive, by publication, "however authorized by the laws of the State, it "was ineffectual against the defendant for any pur- "pose (People v. Baker, 76 N. Y., 78; Matter of "Kimball, 155 *id.*, 62; Pennoyer v. Neff, 95 U. S., "714; Story's Conflict of Laws, Sec. 539)."

In Pennoyer vs. Neff, 95 U.S., 714, at page 726, Judge Field says: "If without personal service, "judgments *in personam* obtained *ex parte* against "non-resident and absent parties upon mere publica- "tion of process, which in the great majority of cases

"would never be seen by the parties interested, "could be upheld and enforced, they would be "constant instruments of fraud and oppression. "Judgments for all sorts of claims upon contracts "and for torts, real and pretended, would be thus "obtained under which property would be seized, "when the evidence of the transaction upon which "they were founded, if they ever had any existence, "had perished. * * *

"In other words, such service may answer in all "cases which are substantially proceedings *in rem*. "But where the entire object of the action is to de- "termine the personal rights and obligations of "the defendants, that is, where the suit is merely "*in personam*, constructive service in this form "upon the non-resident is ineffectual for any pur- "pose. Process from the tribunals of one State "cannot run into another State, and summon "parties there domiciled to leave their "territory and respond to the proceed- "ings against them. Publication of pro- "cess or notice within the State where the "tribunal sits cannot create any greater obligation "upon the non-resident to appear. Process sent to "him out of the State and process published "within it, are equally unavailing in proceedings "to establish his personal liability." At page 733, it is said, "To give such proceedings any validity "there must be a tribunal competent by its con- "stitution—that is, by the law of its creation—to "pass upon the subject-matter of the suit; and if "that involves merely a determination of the per- "sonal liability of the defendant, he must be "brought within the jurisdiction by service of "process within the State or his voluntary appear- "ance."

As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than

to subject the property of a non-resident to valid claims against him in the State, "due process of "law would require appearance or personal service "before a defendant can be personally bound by "any judgment rendered."

In St. Clair vs. Cox, 106 U. S., 350, at page 353, it is said, "The Courts of the United States only "regard judgments of the State Courts establishing "personal demands, as having personal validity or "as importing verity where they have been ren- "dered upon personal service of the party, or what "is the same thing, of those empowered to re- "ceive process for him, or upon his voluntary ap- "pearance."

To same effect

Harkness vs. Hyde, 98 U. S., 476, at 478.
Owens vs. Henry, 161 U. S., 642, at page 646.
Henrietta M. & M. Co. vs. Johnson, 173 U. S., page 221, at 224.

As shown in part by the complaint, and in part by Mr. Lynde's uncontradicted testimony (page 83), Mr. Lynde left New Jersey in the winter of 1887. He said, "I ceased to be a resident of New "Jersey at that time and have since been a resi- "dent of New York. I have been a resident of New "York two years. I returned from Australia in "1894. That was also in the winter, either January "or February.

"Q. When the decree of divorce dissolving the "marriage was obtained against you, where did "you live or where were you? A. I was in Aus- "tralia.

"Q. Did you hear of it before or after it was "granted? A. I heard of it after it had been de- "cided.

"It is admitted by plaintiff that defendant was a "non-resident of New Jersey at and since the time "of divorce."

The contention is first, that, presumptively, Mr. Lynde ceased, at that time, to be a resident of New Jersey.

The contention is second, that whether this be so or not, for two reasons said fundamental decree as against Mr. Lynde is void, *i. e.*, even though Mr. Lynde continued to be a citizen of New Jersey.

The first reason is, that, as shown above, the Chancellor and Mrs. Lynde's expert have so declared. And this decree can be given no greater effect out of the State of New Jersey than it has in said State.

> Public Works v. Columbia College, 84 U. S., 521.

The second reason is, that Pennoyer vs. Neff and other cases, cited above, show that under the United States Constitution no personal decree can be obtained, as this decree was obtained, against any citizen of any State or Country, and still be valid.

We say this, for, although Mrs. Lynde's expert admitted that the fundamental decree was void, in the New York Appellate Court briefs, Mrs. Lynde's attorneys seemed to lay stress on the fact that the record did not show that Mr. Lynde ceased to be a citizen of New Jersey, although it was shown that he was not a resident of said State. The recent cases in this Court, of Dewey v. Des Moines, 173 U. S., 193; and Cooper v. Newell, *id.*, 555, are to the effect, that by a mere publication of process, such as was made here against Mr. Lynde, no personal judgment can be entered against a *non-resident*. And at the New York Trial it was admitted by Mrs. Lynde's attorney (page 83) that

Mr. Lynde "was a non resident of New Jersey *at* and *since* the time of divorce" It would seem as though a construction would be incongruous which would hold that the protection of the United States Coustitution could be invoked by a citizen of other States, but could not be invoked by a citizen of New Jersey. Again it would seem that, as a plaintiff must prove her cause of action, if, the question of Mr. Lynde's citizenship were at all material, the burden (see Point VIII), would be on Mrs. Lynde to show, by positive testimony, that Mr. Lynde was a citizen of New Jersey.

We also submit that the above positive testimony, as to the fact that this fundamental decree is void, forecloses all discussion as to whether, in the absence of proof to the contrary, the presumption is not—that the service by publication is void (Settlemeir v. Sullivan, 97 U. S., 444, at page 448), inasmuch as (Jacobs on Domicile Section 47) it is contrary to common law principles.

POINT III.

As we have seen, Point II, the fundamental decree is concededly void. Such decree is the sole basis for the alimony decree. Thus the alimony decree must also be void. Especially is this true, inasmuch, as appears in the statement, Mr. Lynde made his jurisdictional objection as to the invalidity of the basal decree and, notwithstanding, was not afforded an opportunity to be heard on the issues purporting to be therein settled.

The jurisdiction to render judgment for alimony is dependent entirely upon the validity of the judgment for divorce. So that if the judgment dissolving the marriage is for any reason void—as it is in this case—(See Point II) so also is the decree for alimony void (see testimony of George H. Bruce, Mrs. Lynde's witness, (page 73), Chancellor's opinion (page 35) and this opinion (page 8) is made a part of the complaint). Said Chancellor's opinion reads (page 35): "As the "decree was against the absent defendant, who "was not served with process did not appear in "the case, and did not have property which was "under the Court's control, it could not have given "alimony. A judgment *in personam* in favor of "the wife (Brown on jurisdiction, Sec. 11; 2 "Bishop M. D & S., Sec. 844; Brown on Di-"vorce, 267).

* * * * * *

"By the unwritten law alimony is not a matter "of independent claim or right (2 Bishop M. D. & "S., Sec. 839; I. *id.*, Sec. 1368). It is incidental "to a bill for divorce or other relief between hus-

"band and wife (Anshutz vs. Anshutz, I. C. E. "Gr., 162; Miller, vs. Miller, Saxton, 386; Yule "vs. Yule, 2 Stoc., 138; Cory vs. Cory, 3 Stock., "400; Rockwell vs. Morgan, 2 Beasley, 119, 121)."

It is not enough for a Court to determine how much, if anything, A owes B, unless it at some time determines A owes B some amount. Now, the Courts below have said that, if anything, Mr. Lynde owes Mrs. Lynde a certain amount, but whether, in fact, he owes her anything at all, depends on whether she has shown that he was guilty of desertion, and Mrs. Lynde is entitled to a divorce therefor. There is no pretense in the case that, after his appearance, Mr. Lynde had an opportunity to be heard on this question. Still Mrs. Lynde's attorney and the Courts, state that Mr. Lynde argued the amount of money, if any, that he should pay, and by this fact, he pleaded to the merits, when the record is uncontradicted that he raised the jurisdictional objection that he had not been heard on the merits of the action, *i.e.*, as to whether he had deserted his wife, and whether she was entitled to a divorce for that reason.

We refer to the opinions themselves in the records and the quotations thereof in the preceding statement, to show that the above remarks convey a correct idea of the theory of this case that has thus been sustained. We merely repeat the following: In the Court of Appeals, Judge Gray said (page 116): "But whether its invalidity was "cured or not, in the subsequent proceeding to "which the defendant was a party, a final decree "was entered adjudging that he pay to the plaintiff "a certain sum of money."

And merely because Mr. Lynde appeared on this motion after the void decree, the invalidity of which it is not pretended was cured, Judge Gray (page 114), has said: "There cannot be the slightest

"question that his appearance is general." Judge Bartlett, as we show in Point V, also says such an appearance was general.

Nothwithstanding their remarks, we submit that it is well settled that a decree is void, which is entered under the above circumstances.

Mr. Works, in his Treatise on Courts and their Jurisdiction, at page 105, says: "The appearance "after a default, and making an ineffectual motion to "set aside the judgment, will not operate as a waiver "of defective service. Nor will an appearance and "contest of the amount of damages after a default, "operate as such waiver. It is only where he de- "sires to defend the action that it is necessary for "the defendant to appear specially and object to "the jurisdiction."

In the first place to enter a decree in this manner is not due process of law.

In Hagar v. Reclamation District No. 108, 111 U. S., 701, at 708, it is said:

"It is sufficient to observe here that by 'due "process' is meant one which, following the forms "of law, is appropriate to the case, and just to the "parties to be affected. It must be pursued in "the ordinary mode prescribed by law; it must be "adapted to the end to be obtained; wherever it is "necessary for the protection of the parties, it "must give them an opportunity to be heard "respecting the justice of the judgment sought. "The clause in question means, therefore, that "there can be no proceeding against life, liberty "or property which may result in the deprivation "of either, without the observance of those general "rules established in our system of jurisprudence "for the security of private rights. (Hurtado v. "California, 110 U. S., 516, 536.)"

In Windsor v. McVeigh, 93 U. S., 274, at 277,

the Court said: "That there must be notice to "the party of some kind, actual or constructive, "to a valid judgment affecting his rights, is ad- "mitted. Until notice is given the Court has no "jurisdiction in any case to proceed to judgment, "whatever its authority may be by the law of its "organization over the subject matter. But notice "is only for the purpose of affording a party "an opportunity to be heard upon the claim "or the charges made; it is a summons for him to "appear and speak if he has anything to say why "the judgment should not be rendered. A denial "to a party of the benefit of a notice would be in "effect, to deny that he is entitled to notice at all; "and the sham and deceptive proceeding "had better be omitted altogether. It would be "like saying to a party, appear and you shall be "heard; and when he has appeared, saying, "Your appearance shall not be recognized and you "shall not be heard." * * *

"The law is, and always has been, that whenever "notice of citation is required, the party cited has "the right to appear and be heard; and when the "latter is denied, the former is ineffectual for any "purpose. The denial to a party in such a case, of "the right to appear, is in legal effect a recall of the "citation to him. * * * In the McVeigh case, "the following remarks by Justice Story are cited "with approval: "It is a rule," said the learned "judge, "founded in the first principles of natural "justice, that a party shall have opportunity to be "heard in his defense before his property is con- "demned, and that charges upon which the con- "demnation is sought shall be specific, determinate, "and clear. If a seizure is made and condemnation "is past without the allegation of any specific "cause of forfeiture or offense, and without any "public notice of the proceedings, so that the

"parties in interest have no opportunity of appear-
"ing and making a defence, the sentence is not so
"much a judicial sentence as an arbitrary sovereign
"edict. It has none of the elements of a
"judicial proceeding and deserves not the
"respect of any foreign nation. It ought to have
"no intrinsic credit given to it, either for its
"justice or its truth, by any foreign tribunal. It
"amounts to little more, in common sense and
"common honesty, than a sentence of tribunal
"which first punishes and then hears the party,
"*castigatque, auditque.* It may be binding upon
"the subjects of that particular nation; but, upon
"the eternal principles of justice, it ought to have
"no binding obligation upon the rights of prop-
"erty of the subjects of other nations, for it
"tramples under foot all the doctrines of interna-
"tional law, and is but a solemn fraud, if it is
"clothed with all the forms of a judicial proceed-
"ing."

In Hovey v. Elliott, 167 U. S., 409, the Trial Term of the Supreme Court of the District of Columbia directed that a defendant's answer be stricken out and judgment given in favor of plaintiff, because defendant was guilty of contempt in failing to pay money into Court. This was held unconstitutional, on the ground that it was taking property away without a hearing.

In the opinion in this case, Mr. Justice White cites, with approval, the above case of Windsor vs. McVeigh. He also cites Galpin v. Page, 18 Wall, 350, at page 368, to the effect that

"It is a rule as old as the law, and never more
"to be respected than now, that no one shall be
"personally bound until he has had his day in
"Court, by which is meant, until he has been duly
"cited to appear, and has been afforded an oppor-
"tunity to be heard. Judgment without such

"citation and opportunity wants all the attributes "of a judicial determination; it is judicial usurp "ation and oppression, and can never be upheld "where justice is justly administered."

At page 446 of said case, Mr. Justice White says: "There is no distinction in principle between "determining a cause upon issues not raised by "the pleadings in the actual absence of the plain- "tiff, and rendering a decree by refusing to "permit a defendant to be heard in his defense, "or to consider the merits of a sufficient defense, "and, indeed, by striking the pleading containing "such defense from the files."

In this case Justice White cites cases to the same effect from many jurisdictions, and at pages 437 to 442 shows that a New York case to the contrary, was against the current of authority.

In the present Lynde case, Mr. Lynde was not given an opportunity (statement, pages 11 & 12) to put in any answer on the merits. It is, therefore, submitted that in this action there has been as clear a violation of that due process of law that is secured by the United States Constitution, as in any of the cases cited above.

In Freeman on Judgments it is said (Vol. I, Sec. 118):

"According to the reasoning of the Supreme "Court, the issue and service of process is equiv- "alent to a direction to the defendant to appear "and present his defense for the consideration of "the Court; and its refusal, after he does appear, "to hear him or permit him to assert his rights is, "in legal effect, a revocation of its process, and, "therefore, it has no other jurisdiction over him "than it had prior to the issuing of such process."

And, at section 121, it is said, "It is now settled

"that a Court may, in effect, abdicate its jurisdic-
"tion over the parties by refusing to hear them
"after they have been regularly brought into Court,
"as when it orders answers to be stricken out
"because they refused to take the oath of loyalty,
"and judgment is therefore rendered, but it is
"void."

Lang v. People, 14 Mich. 439, at page 454, holds as follows: "It has been held quite uniformly that "legal proceedings which do not provide for due "service to the party charged, and which do not "give him a chance to have his rights tested in "a legal way, are not due process of law, and are "in violation of constitutional right Such has "frequently been held by this Court. Hubbard v. "People, 4 Mich., 126; Parsons v. Russell, 11 *id.* "113; Ames v. Port Huron Log Driving and "Booming Co., 11 *id.* 139; Price v. Hopkins, 13 "*id.* 318; Groesbeeker v. Seeley, 13 *id.* 329."

It is seen by the above cases, that the test as to whether an appearance is valid, is whether or not the party has had an opportunity to try all the issues and not as to whether he happened, as the opinions (pages 103, 104 and 115) in New York declare, to have in some form appeared before a supplemental decree was entered. Mr. Lynde has sworn (page 56) that he did not desert Mrs. Lynde And yet, as he put in a so called general appearance, the New York Courts have assumed that he did so desert her. Unless this be so, there is no basis for the alimony decree. This assumption was not due process of law. In Rees v. City of Watertown, 19 Wall. 107, at page 123, it is said: "Whether in fact, the individual has "a defense * * * is not important * * * "To assume that he has none, and therefore that "he is not entitled to a day in Court, is to assume

"against him the very point he may wish to "contend."

Notwithstanding the adverse decisions herein in the State of New York, due largely, as we believe and say with respect, to the fact that the Courts below have been careless in their grasp of the real facts in this case, we say with all confidence, that in no state has our contention under this point, been more sanctioned than in the Courts of New York.

In the early case of Bloom v. Burdick, 1 Hill (N. Y.) 130, it is said, "It is a cardinal principle "in the administration of justice that no man can "be condemned or divested of his right until he "has had an opportunity of being heard; and if "judgment is rendered against him before that is "done, the proceeding will be as utterly void as if "the Court had undertaken to act where the sub-"ject matter was not within its cognizance."

One of the clearest cases in the books on the point that a decree is unenforceable which has for a basis a void decree, is Ward v. Boyce, 152 N. Y., 191, which, as we have shown, involved a federal question. This case was cited by us to the New York Court of Appeals. Judge Gray attempted to distinguish that case from our case. Again, we respect, we say that in his attempt, he forgot for the time the controlling facts of our case. Let us take Judge Gray's statement of the facts of Ward v. Boyce. At page 117 he says, Ward v. Boyce "was upon a promissory note, made by the defend-"ant to the plaintiff's order, and the issue between "the parties was as to the plaintiff's ownership. "The defendant claimed that the record of a "certain proceeding in a Justice's Court, in the "State of Vermont was conclusive evidence that "the note was not her property, but was that of her " husband. The proceeding in the Vermont Court

"was by way of trustee process and was instituted "by a creditor of Mr. Ward, this plaintiff's hus- "band, against him and Boyce, the maker of the "note, as his debtor. Ward was a non-resident, "did not appear, and judgment went against him "by default. Boyce, the other defendant, ap- "peared and stated that he gave the note to Mrs. "Ward for cattle purchased, and he asked that she "be cited to appear. A citation was served upon "her in the State of Vermont, to show cause why "the note should not be adjudged to be held as her "husband's property by his creditor." Then Judge Gray says, "We held that the judgment "did not conclude Mrs. Ward, because she was "not a party to the proceeding and was cited to "appear at a stage of it, when she had no oppor- "tunity to litigate the fundamental issue. The "principal fact had then been adjudged, that the "indebtedness for the cattle, for which the note "was given, was owing to the husband; and this in "a special statutory proceeding, in which the Court "had acquired no jurisdiction by service of any "process upon him, or upon his wife, who held the "note. When she was cited, it was not that she "might contest the validity of the judgment against "her husband but merely to show cause why the "note should not be adjudged as her husband's "property and to be held by his creditor."

We have attempted to show in the statement that notwithstanding Judge Gray's observation, in the respect that no opportunity was afforded the defendant to contest the fundamental issues, Ward v. Boyce and the present case are identical. A perusal of the record herein will show this fact beyond all dispute.

Judge Gray attempts to make one more distinction between the two cases, which we believe to be

equally untenable. He says *supra* Ward v. Boyce was a "special statutory proceeding."

In the first place, the New York Courts hold that all divorce actions are statutory and so Judge Bartlett has pointed out in his opinion in this very case. At page 104 Judge Bartlett says: "The "proposition that the Courts of this State have no "jurisdiction over the subject of divorce except as "they derive it from statute has quite recently "been reasserted by the Court of Appeals (Walker "v. Walker, 155 N. Y., 77)."

In the record there is no proof that the law in New Jersey is different and the presumption therefore is that it is the same as in New York. Hynes v. McDermott, 82 N. Y., 41, at 47. And it is shown by Mrs. Lynde's expert (page 73) and uncontradicted, that without a divorce, alimony could not be granted in New Jersey.

Again, as the New Jersey law is not proved, even if it be different than the New York law, this Court will take no notice of it. Hawley v. Donoghue, 160 U. S., 1, at page 5.

In the second place it is not apparent how the rule on this point can be any different in "a special statutory proceeding" from any other proceeding or action. Of course, a state may in matters of procedure in statutory proceedings, require that certain highly technical formalities be complied with. However, that is not the point in Ward v. Boyce, nor in our own case. The attack on each of said judgments was along jurisdictional lines. The defendant in each case complained that he was deprived of his property when he "had no opportunity to litigate the fundamental issue." Thus the guarantee of due process of law was not secured in either case. And it is submitted that this guarantee is no more applicable to a "special statutory proceeding" than to

any other action or proceeding. And so the New York Court holds. Stuart v. Palmer, 74 N. Y., 183. Indeed, in many statutory proceedings, less strictness is required, as property may be taken without personal notice. This rule, however, (Point III.) does not apply to this case, where a judgment *in personam* has been awarded. We are positive that the rule that governs Ward v. Boyce, governs this case.

Ward v. Boyce, which, so far as the Courts of New York went, should have been decisive in our favor of the present case, holds

"The most that can be said is, that the plaintiff "had notice of a part of the proceedings. * * * "But before she was made a party by such notice, "important questions affecting her had been de- "cided." * * *

"The judgment ought not to conclude here, "when it appears that she was not a party to the "whole proceeding but was brought in at the "end under a permissive provision of the statute, "and at a stage when she had no opportunity to "litigate the fundamental issues in the action. So "we think she was not a party to the former suit "in that full and complete sense which the law "implies, in order to conclude or estop her by the "judgment, in a subsequent litigation." * * *

"It will be seen that the plaintiff, or the moving "party in this Vermont action, was Herrick, and "while there are what might be called two judg- "ments in the same action, the last was supple- "mental to the first, and properly, the proceeding, "from commencement to end, must be regarded as "one action. But the plaintiff was not in any way "made a party to it, until the principal fact had "been adjudged, which was that her husband was "indebted to Herrick. Neither the husband nor "the wife had any opportunity to contest that fund-

"amental element in the litigation, and unless that "can be treated as a valid judgment in this juris- "diction the subsequent proceedings for its en- "forcement must fail. It is the same as if a credi- "tor in this State should inaugurate supplemental "proceedings upon a void judgment. Any order "or judgment made in such proceedings would also "be void for want of jurisdiction. It is no an- "swer to say that the plaintiff had personal notice "of the final proceedings against the trustee. "These proceedings rested upon the prior judg- "ment, and unless that is binding upon her the "rest of the proceedings must fail with it. The "proceeding must be regarded as a whole from "the time that the first process was issued until "the adjudication against the trustee."

* * * * * *

Page 200:

"Since there was no jurisdiction of the debtor, "and no opportunity for his wife to litigate the "question upon which all other questions depend- "ed, the judgment ought not to conclude her in a "subsequent action in another jurisdiction."

We thus see that the New York cases are in full accord with the McVeigh case; that the test of the enforceability of a decree is, whether the party was afforded an opportunity to be heard in respect to the issues of a decree which was subsequently awarded. An examination of the record will show beyond all dispute that no such opportunity was afforded Mr. Lynde in this case.

POINT IV.

Inquiry as to the only rational result of defendant's appearance in this action on an ancillary motion after the fundamental issues were determined.

If the defendant had been served in the State of New Jersey with the motion papers to amend the form of the decree, and did not appear in response to said notice, could it be seriously contended that such service rendered the prior void decree valid. As a matter of fact he appeared to oppose the motion and on any rational theory he thereby did no more for the plaintiff than if he had been served in New Jersey with the motion papers.

The distinction is manifest between the effect of an appearance in an action where all the issues are to be tried and an appearance on a motion for the purpose of resisting the amendment of a decree after the main question has been decided and for this reason: Notice is essential to due process of law which secures to a party a hearing. A timely appearance which secures the same thing is waiver of the formal notice, but an appearance after judgment which will not secure a hearing is not due process of law.

It is true the defendant had notice of the judgment against him. Such notice would appear on its face to be of little value to a person who wanted to defend himself in respect to the matters to which he is concluded by the judgment already rendered and not opened. Such a notice is notice after the fair.

If that is due process of law, then any appearance to resist an application for further relief on a

void judgment gives validity to such void judgment.

It is not enough that the owner may by chance have notice or that he may, as a matter of favor, have a hearing; the law must require notice and give a right to a hearing.

Even if in this action, the jurisdictional objection was not raised, it is submitted that the alimony decree herein would not be binding. It is the duty of the moving party to afford the other side an opportunity to be heard on all the issues. In Roller v. Holly, 176 U. S., 398, a judgment *in rem* was obtained in Texas against a resident of Virginia, on five days' notice. The Court held that so short a notice was not due process of law. The suggestion was made, that, if the attention of the Texas Courts were called to the fact that the defendant wanted more time to open the judgment, the Texas Courts would probably have given it to him. This Court, however, said at page 409 of said case: "Very probably, too, the Court "which rendered the judgment, would have set the "same aside, and permitted him to come in and "defend; but that would be a matter of discretion "—a contingency he was not bound to contem- "plate. The right of a citizen to due process of "law must rest upon a basis more substantial than "favor or discretion." And yet, in the present case, by overruling the jurisdictional objection, the Court's discretion was exercised to deny Mr. Lynde the privilege of being heard on the fundamental issue.

See also

Davidson v. Board Ad., &c., New Orleans, 96 U. S., 97.

Stuart v. Palmer, 74 N. Y., 183.

It will be noticed that the plaintiff and the

Courts below have felt compelled to rely upon the appearance we have discussed, they have felt it incumbent to call it a "general appearance," though how that appearance could possibly be more or less than it actually was, that is, an appearance to resist the motion to amend the decree, is not apparent. By it there was no submission to try the issues already determined.

Much confusion is raised in this case by talking of a general appearance. It will be recalled that the only appearance was in response to a motion and it would seem unnecessary to state that the appearance in opposition was for the purposes of resisting the motion. Such an appearance does not carry with it the result of a general appearance before judgment, which will conclude a defendant as to jurisdiction of the person. A *general appearance* has been defined as " a simple and absolute submission to the jurisdiction of the Court" (1 Bouvier Law Dictionary, p. 128, Title Appearance).

How can a person appear for the first time on a motion after judgment except for the purposes of the motion? He cannot appear to try the case.

It will be noted that there is not even an adjudication binding this defendant as to whether the defendant was the husband of the plaintiff. As a matter of fact (page 56) he denies that he was guilty of the charges made by the plaintiff, and for which she claims she is entitled to a divorce. It needs no citation of authority to show that the primary duty is upon the wife to make her home with her husband. If the marital relation were conceded, that surely would not of itself support an action for divorce. A wife must prove her charges and give the defendant an opportunity to establish whose fault it is that the marital relation is disturbed. The defendant has always

claimed that it was through no fault of his own. Surely here was the fundamental issue. Without proof of these facts, there is no basis for the award of alimony. And as we have shown, the complaint itself declares that alimony can only be awarded in connection with a divorce.

Is it conceivable if a plaintiff should allege that one A, for example, was B's agent, and had misappropriated funds, and, if B conceded the amount of the misappropriation but denied that A was his agent, is it conceivable that plaintiff could recover of B without establishing the agency? Of course not. And for the reason that the agency is the fundamental issue.

So in the case at bar, as the lower Court has conceded, the fundamental judgment is void. And in the words of Judge O'Brien, in Marden v. Dorthy, 160 N. Y. 39, "Void things are no things." It therefore follows that plaintiff asks the Courts to enforce a judgment which has no foundation. We submit that such a request is preposterous.

We submit, that to hold, by a so-called general appearance, on a motion after judgment, a void judgment is galvanized into life, is supremely technical and unreasonable. By such doctrine, substance is sacrificed to form and the Courts grasp at shadows.

Is it reasonable to say that, because Mr. Lynde has been heard after a void decree, on the form of the decree, that he thereby forfeits his right to be heard on the merits?

If Mr. Lynde had appeared on a motion, before the decree, the Court would have required him to state whether he appeared for the motion only, or they would have implied that he appeared in the action generally. If, however, the decree is entered in the action, and a motion is made in

which the issues of the action cannot be tried, is it not unreasonable to say that one must indicate the object of his appearance on such a motion?

We have read and re-read Judge Gray's opinion herein (page 115), and confess to an utter inability to follow his reasoning on the point that the defendant, by his appearance on the amendatory motion, ratified (page 115) the void decree of divorce. Judge Gray previously admitted that the divorce decree was void, or, as he expressed it, "was ineffectual against the defendant for any purpose." If the decree was void for every purpose, why is it not void as a basis of an estoppel? What, then, is there to ratify? In Freeman on Judgments, Sec. 117, it is said: "The void judg-"ment is, in legal effect, no judgment. By it no "rights are divested. From it no rights are to be "obtained. Being worthless in itself, all proceed-"ings founded upon it are equally worthless. It "neither binds nor bars anyone. All acts per-"formed under it, and all claims flowing out of it, "are void." * * * "The first and most mate-"rial inquiry in relation to a judgment or decree, "then, is in reference to its validity. For if it be "null, no action upon the part of the plaintiff, no "inaction upon the part of the defendant, no re-"sulting equity in the hands of third persons, no "power residing in any legislative or other depart-"ment of the government, can invest it with any "of the elements of power or vitality."

POINT V.

When Mr. Lynde's jurisdictional objection was overruled to the effect that he had no opportunity for a hearing on the merits, he thereafter contested Mrs. Lynde's right to the amendatory decree on the merits of that proceeding. Mr. Lynde was not heard on the merits of the action. Such contest did not invalidate the jurisdictional objection, as he was not bound to "desert the case and leave Mrs. Lynde to take judgment by default."

On the ancillary motion to amend the form of the decree, Mr. Lynde, as per statement, pages 5 7, raised the jurisdictional objection that the fundamental decree was void, and so Mrs. Lynde was not entitled to alimony. This was overruled. Thereafter Mr. Lynde resisted the amendatory decree on the ground that the claims (page 41) against his father's estate would leave him nothing, and that such amendment was not allowed by the law of practice in divorce cases in New Jersey. The merits of the action, however, were not litigated. At the close of the motion the Court said (page 37), that "the original decree will be amended without being opened." And it is nowhere pretended that the issue attempted to be determined by the pretended divorce decree was in any way passed upon.

Judge Bartlett (page 102) concedes for us that the jurisdictional objection was duly taken. In fact, as we read his opinion, he says that if Mr. Lynde's solicitor had confined himself to that one objection the objection would have been fatal.

But Judge Bartlett holds that Mr. Lynde lost the benefit of that objection by contesting, on the other grounds above set forth, the merits, not of the action, but of that one proceeding.

That we may do Judge Bartlett no injustice, and that this Court may see the grounds of the decision in the only one of the lower Courts that kept in mind the facts of this case, we quote from Judge Barlett's opinion (page 102): "Neither in any paper served by Mr. Potts, "nor in any of the orders made by the Courts in "New Jersey is there anything to indicate that he "intended to restrict his appearance to the single "purpose of denying the jurisdiction of the Chan- "cellor to amend the original decree of divorce. "On the contrary, the testimony which he intro- "duced in the proceeding could only have been "designed to secure a denial of the application on "the merits, for it was intended to show the falsity "of the plaintiff's claim that all provision for "alimony was omitted from the decree by reason "of the neglect of her solicitor to carry out her "instructions.

"Upon the trial of the present case, Mr. Potts "testifies that he did question the jurisdiction of "the Court of Chancery in the amendment pro- "ceeding, on the ground that the defendant had "never been served with process and on other "grounds; and the grounds specified in his petition "on appeal to the Court of Errors and Appeals "also relate to the jurisdiction of the Chancellor. "In no manner, however, did he limit his appear- "ance or action in behalf of the defendant to the "assertion of the proposition that the Court had "never obtained any such jurisdiction over the "person of the defendant as to empower it to "amend the decree. He went further and liti- "gated the application on its merits; and I think

"the learned Judge at Special Term was justified "in holding that he appeared generally in the "cause."

In passing, we ask this Court to notice the lower Court's definition of a general appearance as given in the last sentence of the above quotation. It is conceded that there was no appearance before the entry of the fundamental decree. However, because on an ancillary motion after this void decree, Mr. Lynde *raised more than one objection to the motion*, it is said that he appeared generally. Likewise the Court of Appeals said (page 115): "There cannot be the slightest question but what "his appearance was general."

Recall the situation. Mr Lynde was met with a motion to amend the decree. He said, "I have "several reasons to oppose this motion." In the first place, on the merits of the motion, there is no foundation for the claim, as that decree is void. In the second place, the net value of my estate amounts to nothing, and I am not liable. Can any Court, with any fairness, say that Mr. Lynde must stake all on one defense? This certainly would be a narrow construction.

And in *ex parte* Lange, 85 U. S., 163 at 178, the Court said:

"There is no more sacred duty of the Court "than, in a case properly before it, to maintain "unimpaired those securities for the personal "rights of the individual which have received for "ages the sanction of the jurist and the states-"man; and in such case no narrow or illiberal "construction should be given to the words of "the fundamental law in which they are em-"bodied."

Again, the law is liberal enough to allow a party to use all the cards he holds, and not compel him

to stake all on one particular card. Indeed, any other policy (Point III) would be depriving a man of his property without a hearing. Such ruling would give him only a partial hearing.

In Steamship Co. v. Tugman, 76 N. Y., 207, the defendant brought an action against a corporation foreign to New York. The defendant moved to transfer the case to the United States Courts. The motion was denied. Then, in the New York Courts, the defendant appeared and contested the *merits of the action* before a referee. It was claimed that thereby the defendant waived his right to go to the United States Courts; and in the New York Court of Appeals this view was sanctioned, the Court saying at page 212, "It may "also be remarked that since the order refusing "to remove the case the defendant consented to "the appointment of a referee to determine the "case and submit to his jurisdiction by trying the "action on its merits. It is at least questionable "whether he has not thus waived his right to in- "sist that the removal had been had."

This Court held differently, Justice Harlan saying (Steamship Co. v. Tugman, 106 U. S., 118, at page 122):

"Nor was the jurisdiction of the State Court re- "stored when the company, subsequently, con- "sented to the order requiring the issues to be "heard and determined by a Referee selected by "the parties, or when it appeared and contested "the case, as well before the Referee as in the "State Courts, up to the final judgment. The "right of the company to have a trial in the Cir- "cuit Court of the United States became fixed "upon the filing of the petition and bond. But "the inferior State Court having ruled that the "right of removal did not exist, and that it had

"jurisdiction to proceed, the company was not "bound to desert the case and leave the opposite "party to take judgment by default. It was at "liberty, its right to removal being ignored by the "State Court, to make defense in that tribunal "in every mode recognized by the laws of the "State, without forfeiting or impairing in the "slightest degree its right to a trial in the Court "to which the action had been transferred, or "without affecting to any extent the authority of "the latter Court to proceed. The consent of the "company to a trial by Referee was nothing more "than an expression of its preference—being com- "pelled to make defense in the State Court—for "that one of the several modes of trial permitted "by the laws of the State. It is true that when "the case was taken up by the Referee, as well as "when heard in the Supreme Court of the State "and in the Court of Appeals, the company pro- "tested that the Circuit Court of the United "States alone had jurisdiction after the peti- "tion and bond for removal were filed. "But no such protests were necessary, and "that added nothing whatever to the legal "strength of its position. When the State Court "adjudged that it had authority to proceed, the "company was entitled to regard the decision as "final, so far as that tribunal was concerned, and "was not bound, in order to maintain the right of "removal, to protest at subsequent stages of the "trial against its exercise of jurisdiction. Indeed "such a case would scarcely have been respectful "to the State Court after its ruling upon the point "of jurisdiction had been made."

In Harkness v. Hyde, 98 U. S. 476 at 479, it is said: "Illegality in a proceeding by which juris- "diction is to be obtained is in no case waived by "the appearance of the defendant for the purpose

"of calling the attention of the Court to such ir-
"regularity; nor is the objection waived when be-
"ing urged it is overruled, and the defendant is
"thereby compelled to answer. He is not consid-
"ered as abandoning his objection because he does
"not submit to further proceedings without protes-
"tation. It is only where he pleads to the merits
"in the first instance, without insisting upon the
"illegality, that the objection is deemed to be
"waived."

In these cases the defendants went to trial on the merits of the action; but this Court held that even that fact did not invalidate the jurisdictional objection. They go much further than it is necessary to go in the present case; for Mr. Lynde has never had an opportunity in any Court to be heard on the fundamental issues.

POINT VI.

Mr. Lynde's second marriage could not validate the void decree.

(A) This must be so on general principles of law.

(B) The contrary view is opposed to the provision of the United States Constitution which declares that no person shall be deprived of his property without due process of law.

A.

In the Rigney case (160 U. S., 531) which came from our state to this Court, and which our adversary and the New York Court of Appeals, have cited as an authority against us, it appeared that after the wife had obtained her divorce, Mr. Rigney re-married. It was strenuously insisted that such fact rendered valid the alimony decree. We quote on this point from the opinion in that case of the Presiding Justice at the New York General Term (Rigney v. Rigney, 53 Hun, 457 at 462).

"The defendant admits by his answer that the "Court in New Jersey had jurisdiction to dissolve "the marriage between himself and the plaintiff, "and having admitted this fact, he cannot be "heard to assert that the Court had no power to "grant the incidental relief which naturally fol- "lowed the right to dissolve the marriage. If the "Court had the jurisdiction to make any part of "the decree, it was empowered to make the whole "decree."

When the Rigney case reached the New York Court of Appeals, that Court repudiated the second marriage ratification theory. The Court (Rigney v. Rigney, 127 N. Y., 408, 416) said: "It "is urged that the defendant, by his sub- "sequent marriage and motion to correct "the judgment, recognized its validity in

"all its parts and is estopped from questioning "the right of the Court of Chancery to render a "judgment for alimony and costs. We fail to dis- "cover on what principles these facts can be held "to create an estoppel by conduct, as the plaintiff "neither did, nor omitted to do, anything by reason "of these acts."

Later, the same case came to this Court, and the judgment of the Court of Appeals was reversed (Laing vs. Rigney, 160 U. S. 531). The reversal, however, was not on this point (Hekking vs. Pfaff, 82 Fed. Rep., 402).

In the Pfaff case, at page 404, it was pointed out that the decision of this Court in the Rigney case, did not in the least sanction the doctrine that a second marriage could ratify a void decree. Judge Putnam said:

"The plaintiff relies on Laing v. Rigney, 160 "U. S., 531. A careless reading of that case might "give an impression that the circumstances were "substantially like those at bar; but a careful ex- "amination of it shows beyond all doubt that the "question considered by the Supreme Court was "not one of jurisdiction, but merely one of the form "of proceedings as determined by the local law of "the State where the judgment was rendered, and "in which both parties resided when the proceed- "ings were commenced."

On the general question the Court in the Pfaff case said: "First of all, as the State itself has an "interest in the marriage, its existence or non-ex- "istence cannot be determined by the mere contract "or conduct of the parties, whether operating in "the form of an express agreement or in that of "estoppel, waiver or ratification. In one case as in "the other, it is equally the voluntary act of the "party without the consent of the State. It will be

"found that none of the well considered cases to "which the plaintiff refers turned on the question "whether waiver can validate a decree of divorce "which is actually void, but in each such case "there was a judgment by a Court having juris- "diction, though alleged to be erroneous, or there "was a judgment from which an appeal had been "taken, and which would, therefore, be validated "unless the appeal were sustained. Under such "circumstances Courts would be justified in apply- "ing those equitable rules which enable them to "control to a certain extent inequitable attacks on "judgments by either a writ of error or an appeal. "Anything beyond this, and especially anything "which would enable either one or both parties to "a marriage to validate, under color of estoppel, "waiver or ratification, a pretended divorce, can- "not be held as well considered law.

"The true state of the law seems to us to turn on "more fundamental propositions. If there was "nothing to be ratified, then, of course, the plain- "tiff's whole proposition falls to the ground.

"As South Dakota had undoubted actual juris- "diction to determine the status of the plaintiff, "and has done so by a proceeding which is not "erroneous under the laws of that State, so that "she was divorced from the defendant and was "no longer his wife, the consequence seems inevi- "table that the defendant, by marrying, simply "accepted the fact of such status of the plaintiff "as thus fixed, and he was neither asked to do "anything, and in fact did not do anything, in the "nature of ratification, waiver or estoppel (*Bishop "on Marriage, Divorce and Separation*, Vol. 2, "Sec. 137). Had the decree of the Court of South "Dakota been invalid under the laws of that State, "then there would have been an opportunity for "waiver or ratification on the part of the defend-

"ant; but, as it was not, he merely accepted the "condition of things as he found them, and there- "fore he has done no act of waiver or ratification, "nor anything else, which could lay the basis for "any estoppel, or for any other method of preju- "dicing his rights as they existed before his sub- "sequent marriage.

"This is undoubtedly the true solution of this "case; but, if the subsequent marriage of the de- "fendant can operate as claimed by the plaintiff, "in the way either of waiver, ratification or es- "toppel, yet it would seem that, by all the ordi- "nary rules of law, it would operate as such "only in favor of the condition of things as it "existed when he was married. The defendant "did not by his marriage enter an appearance "in the Court of South Dakota, or give "it jurisdiction over him; and all its after de- "crees affecting his pecuniary interests were as "much without jurisdiction against him personally "as had been its prior proceedings. The plaintiff "has produced to us no well considered decision, "nor proposed to us any principle of law which "would compel us to impose on the defendant an "assumption by him either by waiver, ratification "or estoppel, of the after proceedings of the Court "in South Dakota, without limitation, and with- "out jurisdiction over his person or property. "The law on this point seems so clear against the "plaintiff that it is not necessary to enlarge on it "further."

The doctrine that a second marriage can trans- form a void decree into a valid *in personam* de- cree, is, to our thinking, wholly untenable. Let us first recall the facts in this case. Mrs. Lynde, herself, is the moving party and obtains a decree to the effect (pages 10–11) that "petitioner

"Mary W. Lynde and the said defendant Charles "W. Lynde, be divorced from the bond of matri- "mony for the cause aforesaid and the marriage "between them is hereby dissolved accordingly, "and the said parties and each of them are and is "hereby freed and discharged from the obligations "thereof." Thereafter Mr. Lynde remarries. Surely no estoppel can operate here, for the well recognized essentials of an estoppel are here absent. Bigelow in his Work on Estoppel (5th Ed.) at page 26, says, that to create an estoppel the following facts must actually or virtually occur: "1. There must have been false representation "concerning material facts. 2. The representation "must have been made with knowledge of the "facts. 3. The party to whom it was made must "have been ignorant of the truth of the matter. "4. It must have been made with the intention "that it should be acted upon. 5. It must have "been acted upon to the damage of the party act- "ing."

It is to be remarked that for an estoppel every one of these five conditions must be fulfilled. We submit that it is clear that in this case every one of the five conditions is absent.

Mr. Bigelow, in the same work, also shows the requisites of a waiver. He says, at page 29, "Another kind of estoppel by conduct, may arise "by a party to a contract or transaction inducing "the other to act in the belief that the former will "waive certain rights he might otherwise maintain "against the latter. This estoppel does not con- "sist in misrepresentation by the party to be "estopped, nor does it require that the opposite "party should be ignorant of the facts. Waiver "by an underwriter, of the terms of an insurance "contract, is an example; encouraging a licensee to "expend money on one's premises, in the belief

"that the former will thereby acquire rights or "privileges, is another."

There is no principle that runs through these cases that can apply to the present case. Again, how can Mr. Lynde have waived anything, or be estopped, when as soon as he came into the case he raised the jurisdictional objection as to the Court's power to act.

A few words as to the ratification doctrine. A marriage, is of course, a contract. Let us compare our case with an analagous contract case. Suppose an employer desires an agent for a certain position. He seeks one, A, who would fill the position. A says that he will be a faithful, competent servant as long as he is able to work, but that if he works while his health permits, he must be secured a certain sum for life, whether or not his health allows him to work. The agent's terms are accepted, and the agent begins work. At the end of three or four years, the agent leaves, as he says, for good cause. The employer asserts that the agent had no excuse for leaving. Soon thereafter, the employer hires a man to take his place. Has such fact the remotest bearing on the point as to whether the breaking of the first contract was the employer's fault? Has Mr. Lynde's second marriage the remotest connection with the question as to whether he deserted his first wife, after she obtained a decree which had in it the provision that (*supra*) each of the parties to the decree was discharged from the obligations thereof?

Again, even if it were true that Mr. Lynde, by his second marriage, recognized the validity of the divorce, yet he did not thereby say that he would pay Mrs. Lynde the alimony that was awarded by the void decree. If it were held that he were guilty of bigamy, that of course would be a matter

to be settled between him and the State; but it is absurd to say, that because of his infraction of the criminal law, Mrs. Lynde is excused from proving her cause of action in a civil suit. For aught that appears in this record, if both parties were heard on the merits of the action, the Court might find them both at fault. Mr. Lynde (page 56) has sworn that he was not at fault.

The authorities have settled the doctrine that there is no inconsistency in the view that, as far as the dissolution of the martial status goes, a divorce may be valid and still be void as a basis for a judgment in *personam*.

In Cooley, on Constitutional Limitations at page "499, it is said: "The Courts of the State where "the complaining party resides, have jurisdiction "of the subject matter, and if the other party is "a non-resident, they may be authorized to pro-"ceed without personal service of process. The "publication, which is permitted by the Statute, "is sufficient to justify a decree; in these cases "changing the status of the complaining party, "and thereby terminating the marriage." * * *

"But in divorce cases, no more than in any "other, can the Court make a decree for the pay-"ment of money by a defendant not served with "process and not appearing in the case, which "should be binding upon him personally."

Bishop on Marriage and Divorce, 6th Ed., Vol. 2, Sec 159, reads: "A dissolution is only *in rem* "as respects the status of marriage; as to property "rights and personal claims, it is *in personam*. "Hence, the *ex parte* divorce, where there is neither "service of process within the jurisdiction nor ap-"pearance, affects only the status and whatever "depends directly thereon; not those collateral "and personal consequences which require for "enforcement a judicial decree."

"This distinction between the right or jurisdic-
"tion to dissolve the marriage and to order money
"payments, transfers of property and the like be-
"tween the parties has often been recognized, and
"it is alike established in authority and just in
"principle. The only questions open to contro-
"versy relate to the classification of some practical
"things. As to alimony—alimony exists only by
"judicial decree. Therefore, all opinions concur
"in what is said above, that it cannot be validly
"awarded in a mere *ex parte* divorce suit *in rem*,
"where the defendant's domicile is in another
"State."

Freeman on Judgments, Section 584, reads: "But
"a sentence of divorce has, or may have, a dual
"nature. It is a decree *in rem* so far as it fixes
"the status of the parties by dissolving their mar-
"tial obligations. But so far as it disposes of any
"other matter than the marriage relation, it is *in*
"*personam*."

The New York Court of Appeals in the Rigney case, 127 N. Y. at page 412, adopted this same view and cited as authorities, decisions of numerous State Courts.

We have attempted to show that the alimony decree herein cannot be sustained on the theory that Mr. Lynde appeared to resist an ancillary motion after the void decree of divorce. This leaves open the question as to whether the New York Courts will sustain said alimony decree because of Mr. Lynde's second marriage. This is a question of general law. We have shown above, not only that such doctrine has no legal basis but also that the highest Court in New York has declared against such doctrine. In Neilson v. Lagoon, 14 How. 110 it is held that this Court will not assume that a State Court will decide incorrectly a general principle of law.

B.

The doctrine that Mr. Lynde's second marriage could validate the void decree, is obnoxious to the provision of the United States Constitution which declares that no person shall be deprived of his property without due process of law.

We pass the question as to whether in any case, it is possible to vindicate, on any logical ground, the doctrine that a second marriage can ratify a previous divorce, and assert that in this case, such ratification is impossible, as it would take away Mr. Lynde's property without affording him any opportunity to show that he should not be deprived thereof. We need not repeat at length the facts to show that Mr. Lynde never had a hearing on the fundamental issue.

It will not do to say that if for any reason the New Jersey Court had jurisdiction to decree the divorce upon service of process by publication, and so declare the status of the parties in New Jersey, that therefore the matter determined in the absence of the defendant may be a basis for a personal judgment against him. Legislative or judicial declarations in New Jersey upon that subject have no binding force or effect upon the Courts of other jurisdictions. As previously pointed out, it has been determined that a judgment *in personam* cannot be obtained save after personal service or appearance by the defendant. It must follow, then, that it is impossible for State Courts by any refined theory as to ratification, &c., to take away Mr. Lynde's property (Insurance Co. v. The Treasurer, 11 Wall, 204). If he has has had no hearing he is protected by the United States Constitution, and that instrument displaces all laws, so far as they are in conflict with it (Hanenstein v. Lynham, 100 U. S., 483, at page 488).

The extent of the power of this Court to pass on constitutional questions was much discussed in Murdock v. City of Memphis (87 U. S., 591), and the conclusion was reached that no State Court could nullify that power by overriding the constitutional question. At page 636 Justice Miller said: "But if it be found that the issue raised by "the question of Federal Law is of such controlling "character that its correct decision is necessary to "any final judgment in the case or that there has "been no decision by the State Court of any other "matter or issue which is sufficient to maintain "the judgment of that Court without regard to the "Federal question, then this Court will reverse "the judgment of the State Court and will either "render such judgment here as the State Court "should have rendered or remand the case to that "Court, as the circumstances of the case may re-"quire."

Even the police power of the State must be so exercised as not to interfere with any constitutional rights (Matter of Jacobs, 98 N. Y., page 98; Minnesota v. Barber, 136 U. S., 313).

POINT VII.

Laing v. Rigney is clearly distinguishable from the case at bar, as in that case the defendant appeared and answered before the trial of the fundamental issue; and thereafter was himself the moving party upon a motion in relation to the decree therein. In the present case Mr. Lynde did not know of the decree till after its entry, and then appeared to resist the amendment to its form, but was denied an opportunity to contest its fundamental issue.

This brief would be incomplete without a reference to Laing v. Rigney, 160 U S., 531, for of that case Judge Gray says (page 116), that it "is much in point" against us.

In the Rigney case, when the plaintiff brought her original action for divorce, *the defendant appeared and filed his answer.* He was thus regularly in Court at the commencement of the litigation.

Thereafter the plaintiff filed a supplemental bill, alleging different acts of adultery, and at the trial only those acts of adultery set up in the supplemental bill were proved. Thereafter plaintiff brought an action in New York against the defendant who at the time resided there. Defendant's defence was that by the New Jersey Chancery practice it was necessary to serve the defendant with the supplemental bill in New Jersey, or secure his appearance *de novo* after that bill was filed. Defendant called an expert on New Jersey law, who so testified. At the trial, however, after the expert's testimony, defendant's attorney of-

fered in evidence the Chancery Rules in New Jersey, presumably to bear out his expert's testimony.

Judge Follett speaking for the New York Court of Appeals and relying on the testimony of the New Jersey expert, held that the New Jersey judgment could not be enforced in New York inasmuch as the supplemental bill had not been served on defendant in New Jersey and the defendant did not appear in response to such bill.

On the appeal to the United States Supreme Court it was held that the Chancery Rules offered in evidence by the defendant contradicted defendant's expert and that those rules and the Chancellor's own opinion, he having jurisdiction, were better evidence of New Jersey Chancery practice than the expert's testimony, and the judgment was reversed.

It was said by Justice Shiras, in Laing v. Rigney, *supra*, at page 545: "As this record discl[o]s "that the defendant was served with process under "the original bill, and appeared by counsel and "made answer, and was personally served with a "copy of the supplemental bill and with an order "to plead, and, after permitting himself to be de-"faulted, did appear by counsel and procured the "vacation of the original decree and the enrollment "of the decree amended in accordance with his "own motion, it may fairly be said that he "both had an opportunity to be heard, and was "heard."

As to the present case, Mr. Lynde was in Australia *and was not heard* for (page 83) he did not know of the action until *after the entry of the decree* and (page 60) he had been served therein by publication. He had *no* opportunity to be heard, for (see statement, pages 5 7) on the amendatory motion, he raised the jurisdictional objec-

tion, that the decree of divorce was void, and was afforded no opportunity to contest the issue therein settled.

In the Rigney case, as the Court *at the outset* had jurisdiction of Mr. Rigney, if Mr. Rigney was aggrieved his remedy was by appeal. Justice Shiras, at page 542, says: "In Cornett v. Wil-"liams, 20 Wall, 226, 249, where, in a Circuit Court "of the United States, an attempt was made to "destroy the effect of a judgment rendered by a "County Court by alleging error, this Court said: " 'The power to review and reverse the decision so "made is clearly appellate in its character, and can "be exercised only by an appellate tribunal in a "proceeding directly had for that purpose. It "cannot and ought not to be done by another "Court, in another case, where the subject is pre-"sented incidentally and a reversal sought in "such collateral proceeding. The settled "rule of law is that jurisdiction hav-"ing attached in the original case "everything done within the power of that juris-"diction, when collaterally questioned, is to be "held conclusive of the rights of the parties, unless "impeached for fraud. Every intendment is made "to support the proceeding. It is regarded as if "it were regular and irreversible for error. In the "absence of fraud no question can be collaterally "entertained as to anything lying within the juris-"dictional sphere of the original case. Infinite "confusion and mischiefs would ensue if the rule "were otherwise."

Notwithstanding the care with which it is pointed out in the above quotation that those remarks are all predicated upon the fact that the jurisdiction attached in the original case, Judge Gray cites this Rigney case as an authority against Mr. Lynde, who, as we have shown in the above

statement, was without opportunity to be heard on the fundamental issue. Justice Gray says (page 116): "In other words, the Supreme Court of the "United States held that the New Jersey Court "having once acquired jurisdiction of the defend- "ant in the action, whether it retained that juris- "diction, so as to render the final decree in the "proceeding leading thereto, was a question de- "pending upon the law of that State, which could "not be attacked collaterally.

"Laing v. Rigney is much in point; inasmuch "as jurisdiction of the defendant, in this case, "having been obtained in the proceeding, it was "retained by the Court until it made the final de- "cree. The jurisdiction conferred the power to "render the decree and it will be regarded as valid "and binding until set aside in the Court in which "it was rendered."

These remarks are true enough of the Rigney case but are irrelevant to this case. In this case as we have shown in Point III by decisions of this Court, if the New Jersey Court ever had jurisdiction of Mr. Lynde to award alimony, it lost it when it overruled his jurisdictional objection to the effect that the fundamental decree was, as to him, void and afforded him no opportunity to be heard on the issue therein settled and made its order without affording such opportunity.

Again in the Rigney case, Justice Shiras says, at page 544: "It is contended on behalf of the plain- "tiff in error that, even if the defendant could not "have been personally bound by a decree based "upon the supplemental bill because a subpœna "thereunder had not been served upon him within "the State of New Jersey, yet that, as the defend- "ant after the entry of such a decree against him, "appeared in the New Jersey Court by counsel,

"and procured a modification of the decree, he "thereby subjected himself to the decree as "amended."

* * * * * *

"As the appearance of the defendant was not "for the purpose of objecting to the jurisdiction "of the Court, but was rather in the nature of an "appeal to its jurisdiction, and as the objection "successfully made to the decree as originally en- "rolled was restricted to one of its recitals, and "did not attack the decree in the respect that it "adjudged that he should pay the costs and ali- "mony, there is force in the view that he thereby "waived any right to further object to the decree. "At all events, he could not successfully attack "the decree collaterally in a Court of different "jurisdiction, but his remedy, if any he had, "would be by way of appeal."

In our case Mr. Lynde was not the moving party, but appeared in opposition to Mrs. Lynde's motion, and raised his said jurisdictional objection at the outset, and throughout the case, as we have seen in the statement, and further did not in the least waive said objection as we have shown in Point V.

Again in our case, as we have shown in Point I, our point is nothing, if not jurisdictional. Of the Rigney case Justice Putnam in the Pfaff case, *supra* (58 Fed. Rep., 402), said a careful examination of the Rigney case "shows beyond all doubt "that the question considered by the Supreme "Court was not one of jurisdiction, but merely one "of the form of proceedings as determined by the "local law of the State where the judgment was "rendered, and in which both parties resided when "the proceedings were commenced." Under these circumstances, of how little avail it should have

been for Mr. Rigney to resist that decree in another State, is shown by the following quotation:

In Cooper v. Reynolds, 10 Wall., 308, the Court said, "It is of no avail to show that there are "errors in the record, unless they be such as prove "that the Court has no jurisdiction of the case, or "that the judgment rendered was beyond its "power. This principle has often been held by "this Court and by all Courts, and it takes rank "as an axiom of law."

The second marriage question common to both cases we have discussed in Point VI.

It will be remembered that in the Rigney case the appearance was *before* the issues were determined and in the case at bar there was no appearance and no valid service until *after* the decree sought, to be amended. The distinction between the two cases is thus very broad.

The opinion of the Appellate Division dwells at length (pages 100–104) on the question as to whether there was an appearance by the defendant. It will be remembered, however, that all these observations are directed to the question whether there was an appearance on a *supplemental* motion, after the *fundamental* issue, to wit, the alleged desertion on the part of the defendant was determined by the very decree which elsewhere in said opinion (page 101) the lower Court declared was a *void decree*.

When Judge Gray said that the Rigney case was, as to the present case, "much in point," we submit that he overlooked certain broad, essential and supreme distinctions between the two cases.

POINT VIII.

The pleadings herein required Mrs. Lynde to show all essential jurisdictional facts which would make the alimony decree valid.

We know that the State Courts are the ultimate tribunals on questions of pleadings therein and that (Hawley v. Donohue, 116 U. S., 1), in this present case this Court takes judicial notice of the decisions of the New York Courts on questions of pleadings. Our object in inserting a point in this brief on the pleadings is to show that by the New York law, the answer herein threw the burden on Mrs. Lynde to prove all facts requisite to show jurisdiction in the New Jersey Court of Chancery.

The answer (page 57) denied the allegations of jurisdiction (page 6) set up in the complaint. Jurisdiction was again effectively denied (page 57) by a direct allegation to the contrary (Abbott's Trial Brief on Pleadings, Sections 559 and 758. Crasto v. White, 52 Hun, 473. Pomeroy's Code Remedies (3d Ed.). Secs. 624–628). This made it necessary for Mrs Lynde to prove all essential jurisdictional facts. Abbott on Pleadings, Sec. 991, says, "A general denial imposes upon plain-"tiff the burden of proving every fact essential to "sustain a recovery."

Nul tiel record and *nil debet* are common law forms of pleading which in all actions, including actions on judgments of other States, have no place in the system of pleading now in vogue in New York.

> Pomeroy Code Remedies (3d Ed.), Section 682.

Ferguson v. Crawford, 70 N. Y., 253, at 269.
Abbott's Trial Brief on the Pleadings, Secs. 611 and 614.

This Court allows a State Court to apply its new method of pleading to actions on foreign judgments or decrees.

Commercial Bank v. Rochester, 82 U. S., 639.
Hill v. Mendenhall, 88 U. S., 453.
Hardy v. Johnson, 68 U. S., 37.
Judkins v. Union Mutual Ins. Co., 37 N. H., 470.

The answer herein was a denial of Mrs. Lynde's allegations of jurisdiction and thus threw the burden on her to establish all essential facts of jurisdiction.

No such facts have or can herein be shown, and Mrs. Lynde is entitled to no presumption to the contrary.

It is asked that the judgment of the lower Courts be reversed.

GEORGE S. INGRAHAM,
Attorney for Plaintiff in Error.

MARY W. LYNDE,
Plaintiff-in-Error,

vs.

CHARLES W. LYNDE,
Defendant-in-Error.

The New York Special Term required Mr. Lynde to give security for all future payments of alimony. In default thereof, a receiver of his property was directed to make such payments. The higher New York Courts reversed this portion of the lower judgment.

Mr. Lynde in the previous brief has given his reasons for his belief that the decree of alimony herein is void *in toto*. If he be mistaken, the contention is, that this Court will not control the discretion of the New York Courts as to how Mrs. Lynde's judgment shall be enforced.

Metcalf v. Waterhouse, 153 U. S., 671, at 675, holds:

"The point might have been shortly dismissed with this safe declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution from which it can be even plausibly inferred that the States may not legislate upon the remedy in suits upon the judgments of other States, exclusive of all interference with their merits."

Hanley v. Donoghue, 116 U. S., 1, at page 4, says:

"Judgments recovered in one State of the Union when proved in the Courts of another differ from

judgments recovered in a foreign county in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a Court having jurisdiction of the cause and of the parties" (citing Buckner v. Finlay, 2 Pet., 592; McEmoyle v. Cohen, 13 Pet., 312, 324; D'Arcy v. Ketchem, 11 How., 165, 176; Christmas v. Russell, 5 Wall, 290, 305; Thompson v. Whitman, 18 Wall., 457).

On this point Mr. Lynde further relies on the cases cited (fols. 189–195 and 210–213) in the opinions below.

GEORGE S. INGRAHAM,
Attorney for Defendant-in-Error.

FILED
OCT 27 1900
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Clerk

Nos. 305 & 369.

Brf. of Westervelt for D. C. in 369.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. 27, 1900.

No. 305.

CHARLES W. LYNDE,
Plaintiff in Error,
vs.
MARY W. LYNDE.

No. 369.

MARY W. LYNDE,
Plaintiff in Error,
vs.
CHARLES W. LYNDE.

Brief for Mary W. Lynde, Defendant and Plaintiff in Error.

JAMES WESTERVELT,
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27165

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES W. LYNDE, Plaintiff in Error, AGAINST MARY W. LYNDE, Defendant in Error.	No. 305.
MARY W. LYNDE, Plaintiff in Error, AGAINST CHARLES W. LYNDE, Defendant in Error.	No. 369.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief for Mary W. Lynde.

These are cross-writs of error to review a judgment of the Court of Appeals of the State of New York which affirmed an order of the Appellate Division for the Second Department (Record, pp. 110 and 107). Said order of the Appellate Division modifies the judgment of the Special Term entered in the office of the

Clerk of Suffolk County, *so as to adjudge that Mary W. Lynde is entitled to no equitable relief, to no future alimony, and to only $8,840 back alimony and $553.38 costs.* As modified, the Special Term judgment is affirmed.

This Special Term judgment adjudges that a decree for alimony, with the order providing for its enforcement, rendered against Charles W. Lynde by the Court of Chancery of New Jersey in an action between the parties hereto, be enforced against him with like effect in New York as if the same were a judgment of the New York Court. *It adjudges that Charles W. Lynde pay Mary W. Lynde the amount of alimony due to its date, $14,084.65, with $811.38 costs and allowance; directs him to pay alimony in future at $80 per week, the rate prescribed by the New Jersey decree, and to give bond to secure those payments; and, in case he fails to comply with said provisions, appoints a Receiver, ancillary to the New Jersey Receiver, of sufficient of his property to insure the payments directed* (Record, fols. 163–165).

Mary W. Lynde seeks to review the judgment as modified by the Court of Appeals, on the ground that it does not give full faith and credit to the decree of the Court of Chancery of New Jersey.

Charles W. Lynde seeks for an absolute reversal of the judgment on the ground that it deprives him of his property without due process of law, *although he never raised this nor any other Federal question in the New York Courts, as will be seen by the record.*

Statement of Facts.

This action was brought to enforce a decree of the Court of Chancery of New Jersey, *decreeing the payment to Mrs. Lynde of $8,976.07 back alimony and costs to the date of said decree, and $80 a week from December 28th, 1897, as future alimony, and directing Lynde*

to give bond to secure such payments, together with an order of said Court duly made pursuant to said decree, appointing a Receiver of his property and enjoining him from disposing of his property within the jurisdiction of said Court. This action was made necessary by his having removed himself and his property from New Jersey to New York, so evading the operation of so much of the decree as awarded alimony and sequestration, while taking advantage of the divorce by marrying again. It is not an action for alimony. The question of alimony has been decided by the Court of Chancery of New Jersey, a Court of competent jurisdiction.

It should be noted that the following facts are set up in the complaint, and are not denied by the answer (seeComplaint, Record, pp. 2–8; Answer, pp. 56, 57.)

The parties hereto were married in New Jersey, and lived together in New Jersey for about four years. In November, 1892, *while both parties were still domiciled in New Jersey*, Mary W. Lynde filed a petition in Chancery in New Jersey, praying for a divorce and alimony. Charles W. Lynde was not served personally at that time, nor did he then appear in the action. Upon substituted service, properly made, such proceedings were had that on August 7th, 1893, a final decree was made divorcing her from him (Record, pp. 60, 2, 3; Orig., 4, 5; 56, 57; Orig. 107–8; 9–11).

In such cases it is the usual practice in Chancery of New Jersey, in the final decree, to reserve the question of alimony for decision upon a future application (Record, pp. 60, 3, 56, 57). Through the inadvertence of Mrs. Lynde's solicitor, however, without her knowledge and in spite of her instructions, a decree was entered which made no provision for alimony, and did not reserve the question for future consideration (Record, pp. 60, 3, 56, 57).

In 1894 Charles W. Lynde's father died, leaving a large estate. Under his father's will he received

during 1895 and 1896 over $500,000 (Record, pp. 60, 3, 56, 57).

On February 11, 1896, Mrs. Lynde filed a petition and affidavits praying that said decree be opened and amended "*by decreeing that reasonable alimony be paid to her by the defendant,*" *and for other relief* (Record, pp. 61, 62; original, 115, 117; 3, 4, 12; orig., 22, 23).

Upon said petition an order was made directing Lynde to show cause on February 24th, 1896, why the prayer of said petition should not be granted. Certified copies of said petition, affidavits and order were duly personally served upon him (Record, pp. 61, 4, 17, 56, 57).

On said February 24th, 1896, Charles W. Lynde appeared generally by his attorney, J. Herbert Potts, Esq., and opposed petitioner's application on the law and the facts. He filed affidavits denying the facts alleged in the petition (Record, pp. 61, 62, 4, 57, 80; original, 115–118, 7, 107, 108, 147). *Throughout all subsequent proceedings Mr. Potts acted as general solicitor for him. No pretense was ever made that his appearance was not general* (Record, pp. 62, 38, 39, 40–45, 95; original, 117, 118, 70, 73, 74, 83, 173).

On October 27, 1896, the Chancellor, after hearing arguments and proofs on behalf of both parties, made an order amending the decree of divorce by inserting the usual clause providing that Mrs. Lynde should have the right to apply at the foot of the decree for alimony, reserving the right to pass upon the allowance or refusal of alimony and its amount (Record, pp. 61, 37; original, 115, 69; 54 N. J. Equity, 473).

Notice of motion for a reference as to the amount of alimony was immediately served on Lynde's said solicitor. Said motion was adjourned one week at his request, and thereafter fully argued on behalf of both parties (Record, pp. 61, 5, 6; original, 116, 10).

Lynde appealed from said order of October 27, 1896, to the Court of Errors and Appeals (Record, pp. 61, 5) and decision on the motion for a reference was re-

served, at his request, pending said appeal (Record, pp. 6, 47). The Court of Errors and Appeals unanimously affirmed the order appealed from, 55 N. J. Eq., 591 (Record, pp. 61, 5, 45), and thereupon an order was made referring to a Master the question as to the amount of alimony. This order was expressly based on the petition and order to show cause *and Lynde's appearance in February, 1896* (Record, pp. 61, 46, 47). The reference proceeded on due notice to his solicitor (Record, pp. 61, 6), and testimony was taken before the Master during July, 1897 (Ex. "N," Record, p. 47).

On September 7th, 1897, pursuant to a notice of motion for a commission to examine witnesses in New York, Lynde's solicitor appeared before the Chancellor and stated, for the first time, that he was no longer his solicitor. The Chancellor thereupon made an order (Deft.'s Ex. No. 2, Record, p. 98), which recited that "the annexed notice of motion * * * was duly served on J. Herbert Potts, Esq., as solicitor for defendant;" that said Potts "appeared and stated in open court that he is no longer solicitor of defendant," *and thereupon denied the motion with leave to renew "on personal service of notice thereof upon the defendant, either within or without the State." It should be noted that this was merely a motion for a commission to examine witnesses in New York.* The reference to the Master was made some time before this.

Personal service was accordingly made on Lynde thereafter (Record, p. 99), and in the subsequent proceedings Mr. Potts did not appear, though notified (Record, pp. 61, 62). No order that the cause proceed *ex parte* was ever made, *and Lynde received actual notice of all subsequent proceedings* (Record, pp. 77, 82, 49–54, 5–7).

In addition to personal service of notices upon him, all papers were posted in accordance with the chancery rules (Record, pp. 6, 7, 53, 54). After the Master's report was filed, it, with a *rule nisi* to confirm

it, was served on him, together with a notice of motion for a final decree (Record, pp. 6, 7, 49, 51; original, 93, 94, 97). On December 28th, 1897, a final decree was entered, reciting not merely the posting and substituted service, under the rules, of the report, rule *nisi* and notice, but that they were actually "*duly served upon the defendant*" (Record, pp. 50–53, especially p. 51; original, 97).

This is the decree to enforce which the New York action was brought (Record, pp. 50–53). Pursuant to said decree, and again on actual service of notice on Lynde, an order was made (Record, pp. 53–55, 7), appointing a Receiver of his property and enjoining him and his agents from disposing thereof (Record, pp. 55, 56). It was also sought to enforce this order in the New York action.

It became impossible to get anything through the medium of this receivership, and no part of the sum due has been paid (Record, pp. 8, 62).

Mrs. Lynde has no means of support other than her own exertions. Lynde possesses over $500,000 (Record, pp. 61, 3, 48, 52).

Lynde has married again since the application to amend the decree in Chancery of New Jersey (Record, pp. 83, 41).

The New York action to enforce this New Jersey decree was tried before Mr. Justice SMITH.

After this trial at Special Term, Mr. Justice SMITH handed down a decision, in which he granted to Mrs. Lynde all the relief given to her in New Jersey, as above set forth (Record, pp. 70, 71).

The decision of the Special Term was signed January 17th, 1899 (Record, pp. 58–63). The judgment was entered January 21st, 1899 (Record, pp. 63–65).

Lynde filed his exceptions and appealed to the Appellate Division from said judgment January 25th, 1899 (Record, pp. 66–69). The Appellate Division modified Justice SMITH's judgment as above set forth.

The opinion of the Appellate Division (41 App. Div., 280) was filed June 6th, 1899 (Record, pp. 100–107), the order was signed the same day (Record, pp. 107, 108) and judgment was entered June 16th, 1899 (Record, p. 108).

Both parties then appealed to the Court of Appeals (Record, p. 109), which on April 6, 1900, affirmed the order of the Appellate Division (Record, p. 110). The judgment on the remittitur is printed at page 121 of the record. The opinion of the Court of Appeals is printed at pages 111-120 of the record.

Both parties then obtained writs of error from this Court to review the New York judgment (Record, pp. 122, 129).

Specification of Errors.

1. The Supreme Court of the State of New York, on the affirmance and direction of the Court of Appeals of said State, erroneously disregarded and held for naught the binding force of the decree of the Court of Chancery of the State of New Jersey in favor of Mary W. Lynde against Charles W. Lynde, which judgment was obtained upon due appearance in court on behalf of said Charles W. Lynde, and after jurisdiction duly obtained of the person of said Charles W. Lynde and of the subject matter of the suit.

2. The said Supreme Court and Court of Appeals erroneously failed to give such faith and credit to said decree of the Court of Chancery of New Jersey as the said decree has by law or usage in the courts of that State, contrary to the mandate of the Constitution of the United States in that behalf.

3. The Court of Appeals of the State of New York erred in affirming the order of the Appellate Division of the Supreme Court for the Second Department of

said State, and in not affirming the judgment of the Special Term of said Supreme Court.

4. The Appellate Division of the Supreme Court of New York for the Second Department erred in modifying the judgment of the Special Term of said Court, and in not affirming the same.

5. The Court of Appeals and the Appellate Division erred in not deciding that the decree of the Court of Chancery of New Jersey for alimony, counsel fee and costs, directing the defendant therein to give bond, appointing a Receiver of his property and sequestrating the same, which decree of the Court of Chancery was valid and enforceable against Charles W. Lynde personally in said State of New Jersey, was equally valid in the State of New York, and enforceable against him in said State in the same manner, to the same extent and with the like equitable relief.

6. The Court of Appeals and the Appellate Division erred in reducing the amount of the money judgment granted by the Special Term of said Supreme Court of the State of New York.

ARGUMENT.

FIRST POINT.

This Court should dismiss the writ of error obtained by Charles W. Lynde for want of jurisdiction.

The "title, right, privilege or immunity claimed under the Constitution" must be specially set up in the State Court. The intention to invoke the right

must be declared in some unmistakable manner. This Charles W. Lynde, the defendant in the courts below, did not attempt to do.

Oxley Stave Company vs. Butler County, 166 U. S., 648.
Dewey vs. Des Moines, 173 U. S., 193, 198.
Muse vs. Arlington Hotel Co., 168 U. S., 430, 435, 436.
Brooks vs. Missouri, 124 U. S., 394, 395.

In connection with the latter case, a reference to the third separate defense in defendant's answer (Record, p. 57) will disclose the fact that he expressly omits all mention of the Constitution of the United States as in any way relied on by him.

The only two rights under the Constitution which could have been involved in the New York courts were:

(1) *Was full faith and credit given to the decree of the Court of Chancery of New Jersey in favor of Mrs. Lynde?*

(2) *Was Mr. Lynde deprived of his property without due process of law?*

The first of these questions was specially set up by the plaintiff in the Supreme Court of the State of New York. It was the foundation of her cause of action. She won in the State courts, but she might with reason claim that the "decision" of the Court of Appeals was "against the right," in that it did not give to the New Jersey decree the same force and effect which it has by law and usage in the State where rendered. This right was invoked, however, by the plaintiff, and not by the defendant. *Mrs. Lynde alone is aggrieved by the decision of the Court of Appeals, and she alone can review that decision here.*

Missouri vs. Andriano, 138 U. S., 496.

The second of these rights was not specially set up in the courts of the State of New York, and therefore the

Supreme Court of the United States is without jurisdiction to re-examine the final judgment of said courts. An examination of the record in the State Court will disclose the fact that nowhere in the pleadings, on the trial, in the decision, or in the opinions of the Special Term, Appellate Division or the Court of Appeals was any Federal question raised or discussed other than the "full faith and credit" clause of the Constitution, raised by Mrs. Lynde.

It has been held that the United States Supreme Court will dismiss a writ of error to a State Court for want of jurisdiction, if it appears that no Federal question was raised on the trial of the case, but that it was made for the first time in the Appellate Court of the State.

Sugg vs. Thornton, 132 U. S., 524.

Neither the petition for a writ of error, the certificate of the Chief Judge of the State, nor the arguments of counsel in the State Court, can be resorted to for the purpose of showing that a Federal question was raised in the State Court.

Sayward vs. Denny, 158 U. S., 180, 183.
Butler vs. Gage, 138 U. S., 52.

Furthermore, even if a claim of right under the Constitution had been made, it is nevertheless clear that the decision complained of was so clearly right as not to require argument. The writ should therefore be dismissed.

Twitchell vs. Commonwealth, 7 Wallace, 324.
Spies vs. Illinois, 123 U. S., 131, 143 (164).
Brooks vs. Missouri, 124 U. S., 394.
Re Kemmler, 136 U. S., 436, 438.

It needs no argument to prove that upon the facts found by the State Court (Record, pp. 61, 62), as set forth below under the Second Point, the decision, so far as it is now brought in question by Mr. Lynde, was clearly right. *If Charles W. Lynde appeared generally*

in the New Jersey action, and opposed the application which resulted in the very decree enforced in the New York action, he has not been denied due process of law in either State.

In New York he was served with a summons and complaint in the State, appeared by an attorney, answered the complaint, was represented by counsel on the trial, and appealed to the Appellate Division and finally to the Court of Appeals. Certainly the New York Courts have not denied him due process of law. He not only had an opportunity to be heard, but he was heard. It would be absurd to ask the Supreme Court of the United States, even if he had properly raised the point so as to give it jurisdiction, to review the New York judgment by writ of error on this ground.

If he deemed himself aggrieved by the New Jersey decree, he should have attempted to obtain a writ of error to the court of last resort of that State within two years from the rendition of the decree complained of.

SECOND POINT.

This Court must accept and cannot review the findings of fact of the Special Term. These find conclusively that Lynde appeared generally in the New Jersey action, and that the Court of Chancery had jurisdiction both of the subject matter and of the person of the defendant.

On error to a State Court, in both law and equity cases, where the facts are found by the Court below,

the Supreme Court of the United States is concluded by such findings.

Egan vs. Hart, 165 U. S., 188, 191.
Dower vs. Richards, 151 U. S., 658.

This Court has no jurisdiction to review a decision of a State Court upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided.

Dower vs. Richards, *supra*, p. 668.

In the case of Lynde vs. Lynde the Special Term in New York found as facts, among others, the following: "*That the defendant appeared generally to oppose the said application by his solicitor, J. Herbert Potts. That said Potts was duly authorized by said defendant to appear for him in manner and form as he did appear*" (see Finding IX., Record, p. 61; original, p. 115).

"That the prayer of the petition to amend the decree of divorce, on which all subsequent proceedings in said cause were based, was that said decree should be amended and alimony awarded, and for such other relief as should be equitable and just (see Finding XII., Record, p. 62; original, p. 117).

"That, in obedience to the order to show cause why the prayer of the petition should not be granted, *the defendant appeared generally and submitted to the jurisdiction of the Court. That defendant did not object to the validity of the decree of divorce, but recognized its validity by remarrying. That, upon the return of said order to show cause, defendant did not object to the jurisdiction of the Court to entertain the application, but that he appealed to that jurisdiction to deny the said application upon the merits. That the said application was broad enough to include not only the amendment of the decree of divorce, but also the proceedings to make the amendment effective, and that the jurisdiction which the Court of Chancery obtained over defendant could not there-*

after be divested by the defendant. That the Court of Chancery of New Jersey had jurisdiction of the subject matter of said action and of the person of said defendant, and said Court had power to make the said decree for alimony, costs and counsel fee, and the said order to enforce said decree and make it effective, and that said decree and order are valid in the State of New Jersey and binding upon the defendant personally in said State" (see Finding XII., pp. 62 and 63; original pages 117 and 118).

These findings of fact have been approved both by the Appellate Division and by the Court of Appeals, and cannot be questioned in the Supreme Court of the United States.

If these findings of fact are binding on this Court, then there is no question as to the validity of the New Jersey decree. The only question is: How far should the New York courts enforce it?

THIRD POINT.

The evidence at the trial makes the New Jersey Court's jurisdiction still clearer. It shows that the decree and order sued on were duly made, and are binding on Charles W. Lynde personally in that State.

(a) Mr. Lynde's solicitor appeared generally on the application for alimony, and he was authorized to do so.

See Lynde vs. Lynde, 54 N. J. Eq., 473; affirmed, 55 N. J. Eq., 591.

An inspection of the record in the New Jersey Court of Chancery will show conclusively that Mr. Potts'

appearance was a general one. *At page 18 the Chancellor in his memorandum speaks of J. Herbert Potts "for the defendant;" at page 18 his name appears as "solicitor for defendant;" at pages 19 and 21 Mr. Potts cross-examines; at pages 24 and 30 he signs notices of motion on behalf of defendant, and at page 25 he conducts the direct examination of witnesses on behalf of defendant.* These are but a few instances of the many acts of Mr. Potts as defendant's solicitor. Others may be found at pages 30, 34, 37, 38, 39, 40, 43, 44, 45, 46 and 95.

No suggestion was made in the pleadings or on the trial that Mr. Potts exceeded his instructions in appearing as he did. Indeed, the reverse was expressly testified to by Mr. Potts himself (Record, pp. 76, 77, 79, 80), *who stated that he was retained for the purpose of preventing the opening of the decree of divorce "and the granting of alimony"* (Record, pp. 79, 80, 81).

Said Chancery record shows further that the defendant's solicitor not only opposed the opening of said decree, *but filed affidavits so drawn as to influence the Chancellor either to refuse alimony altogether or to award a very small sum (see Plaintiff's Exhibit 2, offered at p. 80; Record, pp.* 95, 41, 42).

These affidavits would have been absolutely immaterial if defendant's opposition had been confined to the mere opening of the decree.

Furthermore, defendant's attorney stipulated at the trial that the opposition to the application to amend that decree was partly based "on the ground that his [defendant's] estate was not as was claimed by the plaintiff" (Record, p. 79).

Drawing and filing affidavits is the usual method, under the practice in Chancery of New Jersey, of appearing and bringing on the hearing upon applications of this nature.

Crane vs. Brigham, 3 Stock. Ch. (N. J.), 29.

Having thus appeared generally, Mr. Potts never

entered an order directing that he cease to be such solicitor, although, as he admitted, that is the proper practice (Record, pp. 80, 81).

There is no question of the necessity of obtaining an order for this purpose.

> Dickinson's Chancery Precedents (N. J.), p. 281, (2) citing 1 Dan. Ch. Pr., 454, and Braithwaite, 564.

We have seen that due notice of the motion for a reference as to the amount of alimony was served upon Mr. Potts (Record, p. 47), and that he appeared on said motion on November 2d, 1896, and afterwards. The testimony offered by defendant shows that he was authorized to do so (Record, pp. 76, 79). It was not until long after this, in March, 1897, that defendant sought to limit Mr. Potts' authority to act for him (Record, p. 97), and it was not *until about September 7th, 1897*, that Mr. Potts stated that he had ceased to act as defendant's solicitor (Record, p. 98).

The defendant seeks to avoid the consequences of these acts of his solicitor in two ways, which may be properly taken up and disposed of now:

(1) He suggests that the appearance, though in form general and unlimited, should not be construed as a general appearance, because there is no such thing in New Jersey as a special appearance. The defendant's witness Mr. Potts testified on direct examination as follows:

"Q. Now, Mr. Potts, in your practice in New Jersey, is there such a thing as a special appearance?

"A. I never heard of such a thing.

"Q. I mean for special purposes? A. I never heard of it in that State" (p. 79).

This statement is not only contradicted by the statement of the same witness that he did not know whether he put on record the fact that he appeared specially (p. 80) and by defendant's sworn answer (p. 57), but is absurd on its face. In New Jersey the practice is regulated by the rules of common law and the English

Court of Chancery (see Stipulation, p. 72). It is unnecessary to do more than cite a few cases in that State where a special appearance has been entered and the practice recognized :

Rigney vs. Rigney, MSS. in Chancery of N. J., 1887 ; cited in Rigney vs. Rigney, 53 Hun, 457 ; 127 N. Y., 408, 411, and Laing vs. Rigney, 160 U. S., 531.

Crowell vs. Bottsford, 1 C. E. Gr. (16 N. J. Eq.), 458, 462 ; citing 1 Dan. Ch. Pr., 593.

(2) Defendant seeks to establish the novel point that, where a general appearance is entered by a defendant to a petition, the prayer of which is separable into two or more parts, such general appearance operates only as an appearance to the first or preliminary part ; and that, after such general appearance and full litigation of the first part of the application, defendant can divest the Court of its jurisdiction to make a final decree by simply ceasing to be represented by counsel after the entry of the interlocutory order.

This is precisely what the defendant attempted to do in this case. A petition and order were served on him to show cause (1) why the decree of divorce should not be opened ; (2) why it should not be amended by awarding alimony ; and (3) why petitioner should not " have such other and further relief as may be equitable and just " (Record, pp. 12, 17). He appeared to oppose this petition (Record, pp. 76, 77), submitted affidavits denying the material facts alleged by petitioner, and his solicitor argued the matter at length (Record, pp. 79, 80, 43). His appearance was never limited or sought to be limited in any way (Record, pp. 79–81).

Manifestly, the first thing to be ascertained was whether the first branch of petitioner's prayer should be granted—whether the decree should be opened at all. So the Chancellor decided that testimony should

first be taken upon the counter-allegations material to this issue (p. 43). This was merely separating the inquiry into its normal divisions, and could not divest the Court of its jurisdiction over defendant.

The courts of New York have frequently recognized a similar practice. They have uniformly held that a decree of divorce and a subsequent order fixing alimony pursuant to a reservation in the decree are both parts of one action, no matter how many years may intervene; and that, jurisdiction having once attached in the cause, the Court can provide for alimony whenever it becomes necessary.

Forrest vs. Forrest, 25 N. Y., 501.
Galusha vs. Galusha, 138 N. Y., 272.
Hauscheld vs. Hauscheld, 33 App. Div., 296.

At no stage of the proceedings did defendant object to the jurisdiction of the Court, either in his affidavits, proofs, arguments or petition of appeal (Record, pp. 24–33, 38, 39, 40–42).

After the Chancellor's order, and months before it occurred to defendant to attempt to withdraw from the case, a notice was served on defendant's solicitor of a motion for a reference as to the amount of alimony, pursuant to the petition and order to show cause of February, 1896, and all subsequent proceedings (pp. 45, 46). The reference to a Master to report how much alimony should be allowed was made in pursuance of this notice, as appears by the recital therein "that the defendant, between the date of service of notice of this motion and argument thereof, appealed from the aforesaid order filed herein on the 28th day of October, 1896" (p. 47).

So that, even if the testimony of Mr. Potts were of a character to inspire confidence, his opinion that the Chancellor's interlocutory order of October 27th, 1896, was a final disposition of the plaintiff's petition, is not entitled to any weight. For the Chancellor's *judgment* was that, pursuant to defendant's appearance, it was

proper to go on with the reference; and, when that was completed, he was satisfied and adjudged "that a money judgment *in personam* should be rendered against" defendant (p. 52).

See Rigney vs. Rigney and Laing vs. Rigney, *infra*, especially 160 U. S., at pp. 543, 544.

All the orders and the decree in the New Jersey case show that it was regarded by the Court as being all one proceeding, and that the defendant was in court as to the whole of it under his general appearance (Record, pp. 46-48, 50-52, 54, 55). However novel and interesting defendant's contention may appear, this Court does not have to pass upon it, for it has already been decided by the Supreme Court of the United States in the last above-mentioned case.

(b) Where a court of equity has jurisdiction and entertains a case, it will ordinarily retain the case until the whole subject is disposed of.

Ostrander vs. Weber, 114 N. Y., 95, 102.
Taylor vs. Taylor, 43 N. Y., 578, 584.
Henderson vs. N. Y. Cent. R. R. Co., 78 N. Y., 423, 437–439.
Lynch vs. Met. El. R. R. Co., 129 N. Y., 274, 280.
Mad. Ave. Bapt. Church vs. Bapt. Ch. in Oliver St., 73 N. Y., 82, 95.

In the light of these cases Mr. Potts' opinion (pp. 99, 82) that the Chancellor ceased to have jurisdiction of defendant after the entry of the order opening the decree of divorce is of no weight whatever. It is, besides flatly contradicted by the testimony of Mr. Bruce, plaintiff's witness (pp. 75, 76). In addition, we have seen already that Mr. Potts' testimony is not in accord with the facts or the record. His testimony, reported in the last six lines of page 77, is contradicted by the date of Defendant's Exhibit 1 (p. 97), for the latter is dated March 22d, 1897, and Mr. Potts claims to have

seen plaintiff's counsel in October or November, 1896, and to have then told him that he "had nothing to do with any further proceedings in that case, except to appeal from" the order of October, 1896. This letter (Deft.'s Exhibit 1), is the only limitation by defendant on the authority of his solicitor that has ever been intimated (compare pp. 79, 80, 81, 95, 96).

Again, in his testimony reported in pages 80, 81, he evidently confuses the motion for a commission to take testimony in New York, made in September, 1897, with the motion for a reference to ascertain the amount of alimony almost a year earlier, in November, 1896.

(c) Where a State Court has obtained jurisdiction of the subject matter and of defendant's person, any error arising thereafter is an irregularity and can be taken advantage of only by way of motion or by appeal. Such irregularity cannot be used to impeach the judgment in an action brought in another State to enforce it.

Jones vs. Jones, 108 N. Y., 415, 426, 427, which case was in many respects like the present one.

The case of Rigney vs. Rigney, 53 Hun, 457; s. c., 127 N. Y., 408; s. c., *sub nom.*, Laing vs. Rigney, 160 U. S., 531, is exactly in point. There plaintiff and defendant were married and resided in New Jersey until January, 1883, when defendant abandoned her and thereafter resided in New York. She filed her bill in April, 1883, to obtain a divorce and alimony on the ground of adultery. Defendant appeared and answered, but the issue so joined was never tried.

In April, 1886, plaintiff filed a supplemental bill, alleging various acts of adultery since the commencement of the suit, and praying for the same relief.

Defendant being then out of the State, substituted service of process was effected, under the chancery rules, upon him. He failed to appear or plead, and his default was noted. The cause then proceeded *ex parte;* on June 13, 1887, a decree was entered whereby

it was found "that the said defendant has been guilty of the crime of adultery charged against him in the said bill of complaint and the supplemental bill thereto," and thereupon an absolute divorce was decreed with alimony and costs to be paid by defendant. Thereafter defendant married another woman.

On September 9, 1887, the solicitors who filed defendant's answer to the original bill served on the solicitor of complainant a notice of motion to strike from the decree the words "Bill of complaint and the," so that it would read: "The said defendant has been guilty of the crime of adultery charged against him in the said supplemental bill." No modification was asked for as to alimony, and the solicitors limited their appearance to the purposes of the motion only. Their motion was granted, the decree was so amended and re-enrolled at defendant's request.

Plaintiff sued in New York to enforce this decree, and on the trial defendant contended that, as he was never served with any subpœna on the supplemental bill, the Court of Chancery never obtained jurisdiction to render a judgment *in personam* against him. The Special Term so held and dismissed the complaint.

For a full statement of the facts in the case, see 127 N. Y., pages 409–411, 160 U. S., pages 532–535.

On appeal, the General Term reversed the Special Term, and held that, as the Court of Chancery obtained personal jurisdiction of defendant under the original bill and his appearance thereto, it had power to make final disposition of the cause, and that though the subsequent proceedings may have been irregular, "defendant must seek the appropriate relief in New Jersey" (see Opinion of Mr. Justice BARTLETT, 53 Hun, 457, 461, and of Mr. Justice DANIELS on p. 462).

The Court of Appeals reversed the General Term (127 N. Y., 408, 416), and plaintiff took the case to the Supreme Court of the United States, which reversed the Special Term and the Court of Appeals.

Laing vs. Rigney, 160 U. S., 531, 539, 542, 543.

This case is in many respects similar to the case at bar, except that there the plaintiff's position was much weaker. There a palpable irregularity was committed, almost a jurisdictional defect, while in this case no irregularity is even alleged. The following language of the Court is peculiarly significant as distinguishing between the presence or absence of jurisdiction *in limine*, and the presence or absence of certain powers under the practice and rules of the Court in question: "In the absence of any statutory direction on the subject and of any reported decision of the Supreme Court of that State, *we are justified in finding the law to be as declared in the very case in hand, where the Chancellor of the Chancery Court of New Jersey has entered a final decree based upon an original bill, the process under which was served upon the defendant within the State, and upon a supplemental bill, a copy of which with a rule to plead was served upon the defendant without the State. So long as this decree stands, it must be deemed to express the law of the State.* If the defendant deemed himself aggrieved thereby, his remedy was by an appeal" (160 U. S., p. 542). * * * "Even if, therefore, it was the opinion of Mr. Dickenson, the defendant's expert witness, that the Chancellor of New Jersey erred in thinking that jurisdiction over the defendant personally was conferred by the service on him within the State of a subpœna under the original bill, and by the service on him without the State of a copy of the supplemental bill and of a rule to plead, such opinion does not support the finding of the trial Court that, under the laws of the State of New Jersey, the decree sued on and offered in evidence was not binding upon the defendant personally. The opinion of the Chancellor differed from that of the witness, and, what is more important, his *judgment* was that, under the laws and practice of the State of New Jersey, the defendant was in his court, subject to its jurisdiction and bound by its decree" (pp. 543, 544).

See, also,

Nations vs. Johnson, 24 How. (U. S.), 195, 201.
Cornett vs. Williams, 20 Wall., 226, 249.
McNitt vs. Turner, 16 Wall., 366.
Kinnier vs. Kinnier, 45 N. Y., 535, 542.
Dunstan vs. Higgins, 138 N. Y., 70, 75.

But the proceedings in New Jersey in Lynde vs. Lynde were all regular and according to the usual course and practice of the Court of Chancery. It is proper to apply summarily by petition to amend or supplement a final decree in equity, without the necessity of again setting the cause down.

Daniel's Chancery Pleadings and Pr., p. 996.
Sixth American Edition, page 991, and cases cited.
Campbell vs. Gardner, 3 Stock. (N. J.), 423.
Lynde vs. Lynde, 54 N. J. Eq., 473; affirmed 55 N. J. Eq., 591.
Dorsheimer vs. Rorback, 24 N. J. Eq., 33.
Jarmon vs. Wiswall, 24 N. J. Eq., 68.

Defendant had actual notice of the application for the final decree. Under the rules of the Court, if he was dissatisfied with the decree as entered, he could have applied for a rehearing, which would have been allowed practically as a matter of course.

Rules 101, 102 and 143–146 of N. J. Court of Chancery.

Having proved that the Court in New Jersey had jurisdiction to render the decree for alimony, we now come to the question as to the enforcement of that decree dy action in New York.

FOURTH POINT.

The Constitution of the United States requires that full faith and credit be given to the decree of the New Jersey Court. As that Court had jurisdiction of the parties and of the subject matter, the courts of New York are bound to give to that decree the same binding force and effect in New York that it has in New Jersey.

U. S. Const., Art. IV.; U. S. R. S., § 905.
Dobson vs. Pearce, 12 N. Y., 156.
Fletcher vs. Ferrell, 9 Dana (Ky.), 372, s. c., 35 Am. Dec., 143.
Cheever vs. Wilson, 9 Wall., 108.
Barber vs. Barber, 21 How. (U. S.), 582, 590, 591.
Shield vs. Thomas, 18 How. (U. S.), 253, 263.
Nations vs. Johnson, 24 How. (U. S.), 195.

This is not an action for alimony as such; neither is it an action upon a decree of a sister State granting alimony alone. It is an action to enforce a decree which directs defendant to pay alimony to plaintiff, and grants to plaintiff full equitable relief for the enforcement of such payment. The decree directs defendant to give bond to plaintiff to secure the money payments, and, in default of such bond, provides for a Receiver of his property.

It is, therefore, urged that it is enforceable in the manner provided by the Special Term judgment (Record, pp. 63–65).

(a) It is proper to file a bill in equity to enforce in all its parts a chancery decree of a sister State.

The Constitution of the United States provides that "Full faith and credit shall be given in each State to the public acts, records and *judicial proceedings* of every other State."

Section 905 of the Revised Statutes provides that "*The records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.*" It should be noted that full faith and credit is given not to judgments alone, but also to "*judicial proceedings*" of sister States. This fact seems to have been overlooked in the case of Bullock vs. Bullock, 52 N. J. Eq., 561, cited with approval in the opinion of the Appellate Division. This was a suit in New Jersey to enforce a New York decree of divorce, which decree ordered the defendant to *execute a mortgage on real estate in New Jersey* to secure the installments of alimony. The New Jersey Court of Errors and Appeals, by a vote of six to five, refused to compel the defendant to execute this mortgage. But it should be noted that of the six Judges two were "lay Judges," while but one of the five was a "lay Judge," the lawyers on the bench being equally divided, four to four. Moreover, the Judge who wrote the prevailing opinion bases his decision on the fact that the New York judgment attempts to affect *the title to lands in New Jersey.* He says at page 568: "But the effect of a foreign judgment or decree as to money in another state must differ from the effect of such a judgment and *decree as to lands in another State.*"

On the other hand, Judge VAN SYCKEL, in a very able dissenting opinion (pp. 572–575), argues very clearly and forcibly that not only *the decree for alimony itself, but also the equitable relief to secure the payment of said alimony, is entitled to full faith and credit, and should be enforced in a sister State* (see p. 574).

Fletcher vs. Ferrell, 9 Dana (Ky.), 372, is directly in point. In that case it appeared that, pending a suit in chancery in Tennessee, concerning the title to certain slaves, defendants bought from one N., a defendant in the Tennessee suit, certain of the slaves in question. N. had removed them to Kentucky pending the suit in

Tennessee in order to sell them to defendants Ferrell and others. The decree in Tennessee decided adversely to N. as to the title and possession of the slaves, and suit was brought in Kentucky in equity to enforce and carry into effect the Tennessee decree. The Kentucky Court regarded Ferrell and his co-defendants as purchasers *pendente lite*, saying (p. 377), that to give the Tennessee decree "conclusive effect upon parties and privies and not upon *pendente lite* purchasers would no more be giving it the same conclusive validity and effect in this State that it has in Tennessee, than if its validity and effect were allowed to operate upon parties only and not upon privies."

Again, at page 380: "We are also satisfied that a court of equity here may take jurisdiction of the cause * * * to carry out and enforce the decree in Tennessee. * * * Had the decree there been rendered in Kentucky, it is abundantly established that an original bill would lie to carry out and enforce it. Nor can it be questioned than an original bill in equity would lie in Tennessee to carry out and enforce the decree in case the slaves were within the jurisdiction and subject to the control of the Court there. *Giving to the Tennessee decree the same force and conclusive effect of a decree in Kentucky, or that full faith and conclusive effect that would be given to it there, we can perceive no just reason for witholding the same remedy here to enforce it.*"

This reasoning is applicable to the case at bar. Unquestionably, a bill would lie in New Jersey to carry the decree and order sued on into effect, if defendant's person and property were now within the territorial jurisdiction of the courts there (Aspinwall vs. Aspinwall, 53 N. J. Eq., 684). *To grant to the plaintiff a money judgment for the total amount due to date under the New Jersey decree, without giving her security for the future, would not be giving to that decree the same effect as it has by the law of New Jersey.*

The case of Barber vs. Barber, 21 How., U. S., 582, is controlling in the case at bar. There the facts were that the wife had obtained a valid decree for divorce and alimony in the Court of Chancery in New York, with further equitable relief similar to that in this case. The husband left New York for Wisconsin. The wife, unable to collect her alimony in New York, sued him in the U. S. District Court in Wisconsin. She attempted first to sue on the law side of the Court, but her case was thrown out on demurrer on the ground that her proper remedy was in chancery (p. 586). She was successful on the chancery side.

WAYNE, J., in delivering the opinion of the Court says, at page 584: "Our first remark is—and we wish it to be remembered—that this is not a suit asking the Court for the allowance of alimony. That has been done by a court of competent jurisdiction. The Court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud" (defendant having escaped the New York Court's jurisdiction).

Later, after showing that the parties to a cause for divorce are bound by a decree for divorce and alimony, given by a State Court having jurisdiction, he says: "*Such a judgment or decree entered in any State of the United States, the court having jurisdiction, will be carried into judgment in any other State, to have there the same binding force that it has in the State in which it was originally given.* For such a purpose both the equity courts of the United States, and the same courts of the States have jurisdiction" (p. 591).

It is undoubtedly within the ancient jurisdiction of courts of equity to interfere to compel the payment of alimony (p. 590), though it seems that this has been limited in England to the amount of alimony already due. The reason for this limitation, however, does not exist here. *An examination of the authorities cited by* WAYNE, J., *shows that it grows entirely out of the peculiar relative situation of the English Courts of Chancery and Ecclesiastical Courts. It is in no way*

applicable to the enforcement in equity in one of our States of the equity decree of a sister State. It merely refers to the granting of a writ by the Court of Chancery which the Ecclesiastical Court has no power to issue, and which must be marked for a sum certain, like our execution against property (Cooper's Eq. Pl., pp. 149, 150; 1 Ch. Ca., 115; 2 Ch. Ca., 145; 2 Vent., 345; 7 Ves., 171, 173; 14 Ves., 261).

Further on in the same case, at page 595, it is said that alimony is "*a judicial debt of record* against the husband, which may be enforced by execution or attachment against his person, issuing from the Court which gave the decree; and when that cannot be done on account of the husband having left or fled from that jurisdiction, * * * *the wife, by her next friend, may sue him, wherever he may be found or where he shall have acquired a new domicile, for the purpose of recovering the alimony due to her, or to carry the decree into a judgment there with the same effect that it has in the State in which the decree was given.*"

Shields vs. Thomas, 18 How., U. S., 253; Nations vs. Johnson, 24 How., U. S., 195, and Cheever vs. Wilson, 9 Wall., 108, also furnish striking instances where an equity decree of one State has been enforced in full in equity in another State or territory.

In the latter case an Indiana Court had decreed a divorce, and that for the support of the children the husband should have one-third of the rents and profits of certain real estate in the District of Columbia, which had been settled upon the wife as *cestui que trust* by a marriage settlement, *and directed her to execute an assignment of said one-third to her husband Cheever.* The property had already been leased by her and the trustee to the defendant Wilson, and an agreement made whereby he was to receive the rents, &c., until certain advances made by him (Wilson) to Mrs. Cheever should be repaid. Yet the U. S. Supreme Court held that the Indiana decree could be enforced against Wilson as well as against Cheever's divorced

wife, by bill in equity, he having had notice of Cheever's rights thereunder.

On page 121 the Court says: "*The decree rendered in Indiana, so far as it related to the real property in question, could have no extra-territorial effect; but, if valid, it bound personally those who were parties in the case, and could have been enforced in the situs rei, by the proper proceedings conducted there for that purpose* (Sutphen vs. Fowler, 9 Paige, 280; Massie vs. Watts, 6 Cranch, 148, 158; 3 Ves., 44; Swann vs. Fonnereau, 3 Ves., Jr., 44; Portarlington vs. Soulby, 3 Mylne & K., 104; Monroe vs. Douglas, 3 Sandf. Ch., 185; Shattuck vs. Cassidy, 3 Ed. Ch., 152; 1 Story Eq., Secs. 743, 744)."

(b) There is no decision which has refused the relief here asked for, in a suit upon a decree of a sister State for the payment of installments, with equitable relief providing means to enforce payment.

The case of Wood vs. Wood (Com. Pl., Special Term, 1894), 28 N. Y. Supp., 154, is clearly distinguishable. There the plaintiff sought to enforce a naked decree for alimony, obtained in France, by sequestration under Sec. 1772 of the Code. The French decree did not sequestrate defendant's property. It merely directed the payment of alimony. Besides, it was not the decree of a sister State, and therefore not entitled as of course to full faith and credit. Plaintiff in New York sought to invoke under the Code (Sec. 1772) the remedies of sequestration, &c. No appeal was addressed to the Supreme Court's power as a court of equity, and no ground for doing so appears to have existed. In his opinion, PRYOR, J., disapproves Barber vs. Barber, but seems to overlook the fact that the arguments in the dissenting opinion of DANIEL, J., have no bearing on a suit in a State Court. Furthermore, he distinctly intimates that if the case were "*qualified by an element of chancery jurisdiction*," he would grant the equitable relief asked.

In a proper case this can undoubtedly be done. *The Supreme Court is the successor of the old Court of Chancery, and as such may grant equitable relief independent of the Code.* This may be done even in the absence of any precedent (see opinion of LANDON, J., at page 120 of Record).

N. Y. Code of Civ. Proc., § 217.
N. Y. Const., 1846, Art. 6, Sec. 3; and Const., of 1894, Art. 6, Sec. 72.
Youngs vs. Carter, 10 Hun, 194, 197.
Sherman vs. Felt, 2 N. Y., 186; approved, 41 N. Y., 159, 162.

While there are many cases holding that an action at law is the proper remedy for the enforcement of a chancery decree for the payment of money, they none of them involve the precise point here raised, as we shall see below.

On the authority of Shields vs. Thomas (18 How. U. S., 253), Mrs. Lynde can, at her option, either bring actions at law for the installments as they severally fall due, or file a bill to enforce and carry into effect the New Jersey decree. *But why should she sue in equity, if only to get a money judgment for the amount already due?* She would then be compelled to bring suit for the very next installment unpaid, and for the next, and so on. An action of debt would do just as well.

In Post vs. Neafie, 3 Cai., 22, perhaps the leading case on the point, and Pennington vs. Gibson, 16 How., U. S., 65, it was held that an action of debt would lie to enforce a chancery decree of any of the States. This doctrine has been followed and approved in scores of cases since, and is now too well settled to discuss.

It should, however, be carefully borne in mind that in these cases, and in all those holding that a judgment for alimony is, in effect, a common law judgment (*e. g.*, Crane vs. Crane, 19 N. Y. Supp., 691; Dubois vs. Dubois, 6 Cow., 494; Springsteene vs. Gillett, 30 Hun,

260), the question whether such a decree could not, at plaintiff's option be enforced by bill in equity, was not raised at all. In each of those cases plaintiff sought only to obtain a money judgment for certain sums due and unpaid under the decree of a sister State, and the only question raised was: Is a chancery decree equally a debt of record with a judgment at law?

Indeed, in Pennington vs. Gibson, often loosely cited to the effect that in such cases an action of debt is the only proper remedy, DANIEL, J., distinctly indicates that, in certain cases, a bill in equity is the proper remedy, if it is desired to enforce the decree in full (16 How., U. S., 65, 77, 78).

FIFTH POINT.

The final New York judgment, so far as it modified the judgment of the Special Term, was erroneous. The Special Term judgment alone gives full faith and credit to the New Jersey decree.

In this connection it is proper to call the attention of this Court to the opinion of LANDON, J., of the New York Court of Appeals, printed at page 120 of the record.

(a) It was error to reduce the money judgment from $14,896.03 to $9,393.38.

The sum of $14,896.03, the amount fixed by the Special Term, was made up as follows (Record, pp. 58, 59, 63, 64):

Alimony and counsel fees due December 28th, 1897 (p. 52)	$8,840 00
Costs in New Jersey suit (p. 52)	136 07
Money judgment of December 28th, 1897	$8,976 07
Interest on $8,976.07 to date of Special Term decision	569 98
Amount New Jersey judgment with interest	$9,546 05
Alimony from December 28th, 1897, to date of Special Term judgment, with interest (p. 64)	4,538 60
	$14,084 65
Extra allowance (p. 64)	700 00
Costs of Special Term (p. 64)	111 38
Total	$14,896 03

Of these amounts the Appellate Division and Court of Appeals allowed only the following (p. 108):

Alimony, &c., due December 28, 1897	$8,840 00
Extra allowance on $8,840, @ 5%	442 00
Costs of Special Term	111 38
Total	$9,393 38

The Appellate Division and Court of Appeals cut out the New Jersey costs, $136.07; interest on the New Jersey judgment, $569.98; the alimony since December 28th, 1897, $4,538.60, and reduced the extra allowance from $700 to $442.

It was error to exclude the New Jersey costs. The allowance and amount of these costs are not in issue, being admitted by the pleadings (pp. 6, 7, 52, 56).

So, too, it was error to allow no interest on the amount of the New Jersey judgment from the date of its entry.

Knapp vs. Knapp, 59 Fed. Rep., 641.

Brisbane vs. Dobson, 50 Mo. App., 170.
Bullock vs. Bullock, 57 N. J. Law, 508.

And in this case the New Jersey decree expressly provides for interest at six per cent. (p. 52).

So that, even if alimony could be recovered only down to the date of the New Jersey decree, the correct amount should be $10,134.73, made up as follows:

Amount New Jersey decree with interest, as above set forth	$9,546 05
Extra allowance on $9,546.05, @ 5%	477 30
Special Term costs	111 38
	$10,134 73

But alimony can certainly be recovered at $80 a week from December 28, 1897, to May 26th, 1898, the date of beginning the action in New York. There are numerous decisions on this point.

See Knapp vs. Knapp, 59 Fed. Rep., 641.
Bullock vs. Bullock, 57 N. J. Law, 508.

On this theory the amount of the judgment should have been $11,918.89, made up as follows:

Amount of New Jersey judgment, with interest	$9,546 05
Alimony at $80 a week from Dec. 28, '97 to May 26th, '98	1,680 00
Interest on the several installments pursuant to N. J. decree	19 20
	$11,245 25
Extra allowance on $11,245.25, @ 5%	562 26
Costs of Special Term	111 38
	$11,918 89

On the theory of the Court of Appeals it would be necessary for Mrs. Lynde, every week or every month, to obtain from the New Jersey Court of Chancery an

adjudication that a certain amount of money is due and unpaid, and then sue on these adjudications in New York. This theory is absolutely at variance with Knapp vs. Knapp and Bullock vs. Bullock, supra.

But we contend that none of these theories is the correct one, and that *alimony should have been awarded down to January 17th, 1899, the date of the Special Term decision.*

It is well settled that a court of equity has power to bring its judgment down to date, and make it conform to the facts as they exist when the judgment is rendered. This is done continually in suits against the elevated railroad, where rental damages are awarded down to the date of the decision.

Lynch vs. Man. El. R. R. Co., 129 N. Y., 280.
Van Allen vs. N. Y. El. R. R. Co., 144 N. Y., 174.
Interlied vs. Whaley, 85 Hun, 63.
See, also, Kilbourne vs. Supervisors of Sullivan, 137 N. Y., 170, 178.

As it is not disputed that the above figures are correct, the money judgment should remain $14,896.03.

(b) The New York Courts erred in refusing to enforce the New Jersey decree by ordering the defendant to pay $80 a week alimony for the future. This the Special Term judgment did.

From the discussion under the Fourth Point it is clear that unless the New York Courts enforce this provision as to future alimony, they are not giving to the New Jersey decree the same force and effect which it has in New Jersey. *If the defendant were in New Jersey, he would be compelled to pay this alimony at the end of each week, and that without any further action on the part of the plaintiff. The award of $80 a week for the future is as much an integral part of the New Jersey decree as is the award of $8,976.07 for back alimony and costs.*

See Dissenting Opinion in Bullock vs. Bullock, 52 N. J. Eq., p. 575.

The learned Appellate Division and Court of Appeals seem to neglect this question altogether. They give no reasons for the conclusion which they reach. They certainly cannot have intended to dispose of this point by the discussion of the distinction between the judgment and the means for its enforcement (Record, pp. 104–106).

Neither does the opinion in Wood vs. Wood, 7 Misc., 579, cited with approval by the Appellate Division (Record, p. 104), give any reasoning in support of the conclusion that the judgment for back alimony alone can be enforced in a sister State.

If the law as laid down by the Appellate Division and Court of Appeals is correct, then the plaintiff, at the end of every week, must begin a new action for the $80 alimony which has accrued during that week, although every question in said actions has been decided in her favor. The defendant can delay and harass her in every possible way, just as he has done in the present action. A judgment such as that rendered by the Special Term is the only method of preventing this and of protecting Mrs. Lynde.

It is not the purpose in decreeing alimony to a wife to give to her a weekly or monthly series of lawsuits, but to provide means to compel the delinquent husband to support her. A court of law cannot fully enforce these rights.

> Pennington vs. Gibson, 16 How. (U. S.), 65, 78.
>
> Thompson vs. Thompson, 52 Hun, 456.
>
> Wetmore vs. Wetmore, 149 N. Y., 520, pp. 528-530; reported below in 79 Hun, 268, 275.

In the latter case the wife had obtained a divorce, and the decree provided that the husband should pay her $3,000 a year as alimony, with additional sums for maintenance of their children, and should give bond in $50,000 as security. In order to prevent the enforcement of the decree, he left the State. Failing to collect

any of the sums due her, plaintiff exhausted all the statutory remedies of sequestration, &c., without effect. She thereupon brought an action to reach and subject to the payment of her alimony the income of a trust fund of which her husband was the beneficiary. The Court directed payment, not only of arrears, but also of the future alimony, out of said fund and the future income thereof.

The Court in Wetmore vs. Wetmore founded its relief, not only on the judgment for alimony, but on the natural duty of the husband to support the wife, from which he was not relieved by the decree of divorce.

(c) The Appellate Division and Court of Appeals erred in refusing to grant the equitable relief granted by the New Jersey decree and the Special Term judgment for enforcing the payment of alimony.

Security by bond, injunction and a receivership is as much a right of plaintiff, vested in her by the record, as are the money payments. To enforce the latter without the former would not be giving to the New Jersey decree the same effect that it has in New Jersey by the law and usage of the Courts there. *Under the New Jersey decree she has a vested right, not only to payment from time to time, but to ample security therefor, other than the personal property of a hostile defendant.* Unless this Court lends its equity powers to enforce this part of the decree, she will be so far unable to enforce her rights.

See Bullock vs. Bullock, 52 N. J. Eq., 575.

The New York Courts have fallen into error through confusing what is "judgment" and what is "execution or in aid of execution" (Record, pp. 105, 106); 41 App. Div., 280, 286–288). On this point Mr. Justice BARTLETT, after discussing Barber vs. Barber, quotes from the opinion in McElmoyle vs. Cohen (13 Pet., 312, 324, 325), concluding that, under the Constitution, "judgments, out of the State in which they are rendered, are

only evidence in a sister State that the *subject matter* of the suit has become a debt of record, which cannot be avoided but by the plea of *nul tiel record*" (see 41 App. Div., p. 287).

Now, granting every proposition leading up to this conclusion, it all amounts only to an additional argument for enforcing in full a decree in equity of a sister State. *In equity, the "subject matter" is not only the money damage which has become "a debt of record," but also the equitable relief; and the latter in turn is a matter of record, conclusive upon defendant.* Therefore, the like relief must be granted in the second State if its laws permit.

Further on (p. 288), the learned Justice who wrote the opinion of the Appellate Division quotes with approval from Bullock vs. Bullock (52 N. J. Eq., 561): "*That only is judgment that is pronounced between the parties to the action upon the matters submitted to the Court for decision.*" We have already seen (Point Fourth) that this line of argument is misleading, because it is not to *judgments* alone of sister States that the Constitution guarantees full faith and credit, but to their "*acts, records and judicial proceedings.*" But even taking the sentence last above quoted as correctly stating the law, it does not justify what follows (see Bullock vs. Bullock, 52 N. J. Eq., 561, 570, 571; Lynde vs. Lynde, 41 App. Div., 280 288). *In the present case "the matters submitted to the Court for decision" in New Jersey included: (1) "Shall plaintiff have alimony and how much?" and (2) "Shall she have further equitable relief for its enforcement (Record, pp. 12, 17)?" Both questions were decided in her favor and incorporated in the decree* (Record, pp. 52, 53). That decree is conclusive as to both questions. There is no less obligation to enforce in New York the New Jersey Court's direction as to the second than as to the first. In order to give full faith and credit to the New Jersey decree, our Courts are bound to enforce its provisions as to equitable

relief fully, so far as our laws may permit. This is the rule and the limitation (McElmoyle vs. Cohen, 13 Pet., 312, 324, 325). In other words, the New York Courts are not bound to grant any relief unknown to their law in enforcing a decree of a sister State. For instance, if the New York Supreme Court had not general equity jurisdiction; if its power to grant equitable relief was limited by statute to certain specified cases, then, unless some statute expressly authorized it to issue injunctions or appoint Receivers to enforce a sister State's decree, it could not give this plaintiff the relief asked for. But the Supreme Court *has* general equity jurisdiction, and its power as defined in Section 217 of the Code is ample for the case in hand. The New York laws do permit the enforcement of this New Jersey decree in the manner asked.

That being so, the first section of Article IV. of the U. S. Constitution is imperative. If the State Court has the power, it *must* exercise it.

The opinion of VAN SYCKEL, J., in Bullock vs. Bullock (52 N. J. Eq., 561, 572–577), contains a very clear statement of the principles applicable to this case. That case, we have seen, was decided by one vote and that the vote of a layman, the lawyers on the bench being equally divided. Judge VAN SYCKEL, in his minority opinion, says, at page 574: "*The decree or judgment in New York has the effect of being not merely prima facie evidence, but conclusive proof, of the rights thereby adjudicated, and a refusal to give it the force and effect in this respect which it had in the State in which it was rendered denies a right secured by fundamental law.*"

Again, at page 575: "The New York judgment is conclusive * * *

"FIRST. As to the right to a divorce.

"SECOND. As to the right of the wife to the alimony allowed.

"THIRD. *It is equally conclusive as against the husband, as to her right to have such alimony secured,*

* * * *that being expressly a part of the adjudication in New York.*"

"*The judgment imposed an obligation upon the husband from which he cannot relieve himself by removing from the jurisdiction in which it was rendered. That obligation follows him into this State.*"

He "*has had his day in Court in New York, where all these questions have been adjudicated against him, and our courts should hold that he is thereby concluded.*"

It is hard to see any flaw in this reasoning. The majority of the Court seems to have decided adversely on the ground that to do otherwise would give extra-territorial effect upon New Jersey real estate to the New York judgment. That point is not involved here.

The Appellate Division and Court of Appeals seem to have thought that plaintiff asks for sequestration and a receiver of defendant's property under Section 1772 of the Code of Civil Procedure (Record, p. 104; 41 App. Div., 286) and cite Walker vs. Walker (155 N. Y., 77), to the effect that the New York courts "have no jurisdiction over the subject of divorce except as they derive it from statute." Nobody will deny this, nor that Section 1772 of the Code refers only to domestic divorces. *But this is not an action for divorce. It is not an action for alimony. It is not an action under the Code of Civil Procedure. It is an action in equity, independent of the Code.* Plaintiff's prayer for relief is addressed to the Court as the successor of the Chancellor, possessed of general equity powers which have not been taken away by the Code (see opinion of LANDON, J., Record, p. 120).

See, also, Wetmore vs. Wetmore, 149 N. Y., 520, 528, where the Court says:

"The Constitution gives to the Supreme Court general jurisdiction in law and equity. As a court of equity it is invested with the power and jurisdiction

exercised by the ancient Court of Chancery in England, with the exceptions, additions and limitations created and imposed by the Constitution and laws of this State (2 R. S., 173, § 36).

"*The code contains statutory provisions with reference to the collection and enforcement of judgments awarding alimony. It, however, contains no provision attempting to limit or curtail the powers of the court of equity. It is the province of that Court to interpose when the law fails to afford an adequate remedy* (N. T. Bank vs. Wetmore, 124 N. Y., 241)."

In that case the Court went further in granting equitable relief than it is asked to do in the present case. There, as here, the plaintiff had exhausted her statutory remedies in the attempt to collect her judgment for alimony. The fact that in this case this was done in New Jersey, rather than in New York, should make no difference. New York's courts must give that judgment the same force and effect as it has in New Jersey if the New York laws permit.

Indeed, in the present action the Court below might properly have granted the equitable relief asked, even if no power were given to it by the Code to grant the same relief in a domestic action for divorce and alimony.

Black on Judgments, Sec. 859.
Stewart vs. Stewart, 27 West Va., 167, 175.
Oceanic Steam Nav. Co. vs. Compania Trans. Espanola, 29 Abb. N. C., 238.
Teel vs. Yost, 128 N. Y., 387.

Much more, should the relief be granted, when, as here, the Court is not asked to enforce any relief repugnant to its practice, but only to carry into effect the provisions of a decree which are similar to what the New York Courts would have granted in a similar case.

Code Civ. Proc., Sec. 1772.
Carey vs. Carey, 2 Daly, 424.

Effect is given almost daily to decrees of sister States appointing receivers and granting injunctions in the appointment of ancillary receivers of foreign corporations. The application in these cases merely shows the appointment of the receiver and the granting of an injunction in the State where the corporation is domiciled, and the New York Courts give the same relief as a matter of course. As Judge VAN BRUNT says in Woerishoffer vs. North River Construction Co., 6 Civ. Pro. Rep., at page 116 : " *In such a case the necessity for, and the right to, a receiver have been adjudicated upon by the Courts of the State where the corporation is domiciled.*"

See also Williams vs. Hintermeister, 26 Fed. Rep., 889, *where a New York injunction was enforced by action in Pennsylvania*, defendant having left New York for Pennsylvania after being served with the order.

So the New York Courts enforce specific performance of a contract to convey lands in a sister State. The decree does not create a lien on the land, but binds the defendant personally.

Gardner vs. Ogden, 22 N. Y., 327.

Much more then should a decree of one State, which is a contract of the most solemn nature, be specifically enforced by the decree of a sister State.

Furthermore, we contend that even if the learned Special Term Justice *were not bound* to grant the equitable relief provided by the New Jersey decree, *still in his discretion he had power to do so. His discretionary action in so doing should not be disturbed, since all the facts of this case show conclusively that in no other way can Mrs. Lynde's rights be protected, and she be saved the delays and annoyances to which the actions of the defendant have so long subjected her.*

SIXTH POINT.

That portion of the judgment of the Court of Appeals which modified the judgment of the Special Term, and the judgment rendered thereon by the New York Supreme Court, should be reversed, and the judgment of the Special Term should be affirmed, with costs.

Respectfully submitted,

JAMES WESTERVELT,

MATTHEW C. FLEMING,

Of Counsel.

Nos. 305 and 369.

Motion for Mandate.

Supreme Court, U. S.
FILED
APR 29 1901
JAMES H. McKENNEY,
Clerk.

Filed April 29, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Numbers 305 and 369.

CHARLES W. LYNDE, PLAINTIFF IN ERROR,

vs.

MARY W. LYNDE.

AND

MARY W. LYNDE, PLAINTIFF IN ERROR,

vs.

CHARLES W. LYNDE.

ON WRITS OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

MOTION FOR IMMEDIATE ISSUANCE OF MANDATES.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-27-'01

Supreme Court of the United States.

OCTOBER TERM, 1900.

Numbers 305 and 369.

CHARLES W. LYNDE, PLAINTIFF IN ERROR,

vs.

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MARY W. LYNDE, PLAINTIFF IN ERROR,

vs.

CHARLES W. LYNDE.

ON WRITS OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

MOTION FOR IMMEDIATE ISSUANCE OF MANDATES.

Now comes Mary W. Lynde, by her attorney of record, and moves this honorable court to direct the mandate in the above cases to issue forthwith, and as ground for such motion respectfully refers to the annexed affidavit.

JAMES WESTERVELT,
Attorney for Mary W. Lynde.

SIR: Please take notice that on Monday, the 29th instant, the undersigned will move this court, at the Capitol, in Washington, at the opening of the court on said day, or as soon thereafter as counsel can be heard, for an order directing that the mandates issue at once, in accordance with the decision of this court, on the above writs of error.

Please take further notice that said motion will be founded upon the annexed affidavit, of which a copy is herewith served upon you, as well as on all papers and proceedings heretofore had herein.

Yours, etc.,

JAMES WESTERVELT,
Attorney for Mary W. Lynde, Def't in Error.

To GEORGE S. INGRAHAM, Esq.,
Att'y for Pl'ff in Error, 164 *Montague St., Brooklyn.*

STATE OF NEW YORK, }
County of New York, } ss:

Frederic C. Irons, being duly sworn, says that he is a clerk in the office of James Westervelt, above named; that on the 23d day of April, 1901, he served the above notice, with the affidavit thereto annexed, on George S. Ingraham, Esq., at his number, 164 Montague street, Brooklyn, by leaving the same with the person in charge of the said office.

FREDERIC C. IRONS.

Sworn to before me this 23d day of April, 1901.

CHARLES M. BLACK,
Notary Public, New York County.

STATE OF NEW YORK, }
City and County of New York, } ss.:

James Westervelt, being duly sworn, says that he is attorney for Mary W. Lynde, above named; that this cause was brought before this court from the supreme court of the State of New York on cross-writs of error to correct the judgment entered against the defendant in an action wherein Mary W. Lynde was plaintiff and Charles W. Lynde was defendant, on June 16, 1899, for $9,393.38.

That after the entry of said judgment actions were begun in the supreme court of New York by Mary W. Lynde against Charles W. Lynde to collect other money due under the terms of the decree of the court of chancery of New Jersey, dated December 28, 1897, and which had accrued since the date of said decree, and were therefore not included in the New York judgment of June 16, 1899; that Charles W. Lynde, in order to stay said subsequent actions, gave certain bonds and undertakings, whereby he agreed, in case the judgment which was afterwards brought before this court, as above set forth, was "not reversed by the Supreme Court of the United States," or if it were decided that the decree of the court of chancery of New Jersey was valid and effectual as against the defendant therein, that then he would pay all sums due or to grow due according to the terms of said decree of said court of chancery.

Deponent further says that there is now due from Charles W. Lynde to Mary W. Lynde accordingly over $26,400; that the said Mary W. Lynde has no means of support other than her own exertions, and that said Charles W. Lynde is

worth over $540,000 and has an annual income of $22,000; that he has fought and opposed this action for over five years, upon every possible ground; that most, if not all, of his pretexts for defending the same have been frivolous, as is shown by his suing out a writ of error, No. 305 of this term, in manner and form as he did; that there is no reason why he should not be compelled to pay the amount due immediately, now that the case has been decided by this court; that Mary W. Lynde is in poor health and has been so for many months past, and is therefore unable to earn as much for her support as formerly, and is in greater need of the money in order to properly care for herself and her health.

Deponent further says that three other actions in the New York supreme court have been stayed pending the result of this action; that defendant below has been compelled to give bonds on appeal, amounting in the aggregate to $101,000, and has had to deposit with his surety thereon securities of great value, which will not be released until a settlement is made.

Wherefore deponent prays that this honorable court will be pleased to direct that the mandate issue at once to the supreme court of New York in accordance with the decision and opinion of this court herein.

JAMES WESTERVELT.

Subscribed and sworn to at New York city, in the county and State of New York, before me this 23d day of April, 1901.

[SEAL.] HENRY B. GAYLEY,
Notary Public, New York County.

[Endorsed:] United States Supreme Court. Charles W. Lynde, pl'ff in error, *vs.* Mary W. Lynde, def't in error. No. 305, October term, 1900. Affidavit and notice of motion that mandate issue. James Westervelt, attorney for def't in error, 52 Wall street, New York. Due service of a copy of the within affidavit and notice is hereby admitted. Dated New York, April 23, 1901. —— ——, attorney for pl'ff in error.

Nos 305 and 369.
Affidavits agt. issuance of Mandate

Office Supreme Court U.S.
FILED
APR 27 1901
JAMES H. MCKENNEY,
Clerk.

Filed Apr. 27, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Numbers 305 and 369.

CHARLES W. LYNDE, PLAINTIFF IN ERROR,

vs.

MARY W. LYNDE.

AND

MARY W. LYNDE, PLAINTIFF IN ERROR,

vs.

CHARLES W. LYNDE.

ON WRITS OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

AFFIDAVIT IN OPPOSITION TO MOTION FOR IMMEDIATE ISSUANCE OF MANDATES.

GEORGE S. INGRAHAM,
Attorney for Charles W. Lynde.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-30-'01

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 305.

CHARLES W. LYNDE, Plaintiff in Error,

vs.

MARY W. LYNDE, Defendant in Error.

State of New York, }
County of Kings, } ss.:

George S. Ingraham, being duly sworn, says that he is the attorney for the plaintiff in error in the above-entitled action; that deponent sent for the opinion herein prior to the time that the case was decided, but did not receive said opinion until last Monday, April 22, and that deponent has spent several days in the examination of legal questions involved in said opinion, with the view to ascertain whether he would apply for a rehearing on collateral questions that deponent believes said opinion has determined, and that deponent has not completed his examination of said question; that this case was decided at the New York special term on January 19, 1899, and that it has since been through two appellate

courts in New York, and that deponent has assisted his adversary in advancing this case in the New York appellate court by exchanging its position on the calendar with a case that was far ahead of it, and that to reach an early decision in this court he agreed with his adversary to submit rather than to argue this case, and that for these reasons he believes he is entitled to the full thirty days before the mandate is returned.

Deponent calls attention to the fact that the moving affidavit sets forth no adequate reason for the granting of this motion, but does set forth a reason for its denial, to wit, that the defendant in error claims that she is only entitled to a certain sum over *$26,400*, but that the plaintiff in error has given bonds to the amount of *$101,000* to secure said sum.

GEORGE S. INGRAHAM.

Sworn to before me this 26th day of April, 1901.

[SEAL.] GEORGE P. BUTLER,
Notary Public, Kings Co., N. Y.

[Endorsed:] United States Supreme Court. Charles W. Lynde, pl'ff in error, ag'st Mary W. Lynde, def't in error. Original. Opposing affidavit. George S. Ingraham, att'y for pl'ff in error, 166 Montague street, Brooklyn, N. Y.

[Endorsed:] File No., 17,790. Supreme Court U. S., October term, 1900. Term Nos., 305 & 369. Chas. W. Lynde, P. E., *vs.* Mary W. Lynde. Affidavit of George S. Ingraham in opposition to motion for mandate. Filed Apr. 27, 1901.

Supreme Court of the United States.

Nos. 305 and 369.—October Term, 1900.

Charles W. Lynde, Plaintiff in Error, vs. Mary W. Lynde.	305	In error to the Supreme Court of the State of New York.
Mary W. Lynde, Plaintiff in Error, vs. Charles W. Lynde.	369	

This was an action brought May 26, 1898, in the Supreme Court for the county and State of New York, on a decree of the Court of Chancery of New Jersey of December 28, 1897, by which it was ordered that the plaintiff was entitled to recover of the defendant the sum of $7840 for alimony at the rate of $80 per week from February 11, 1896, to the date of the decree, and the further sum of $80 per week permanent alimony from the date of the decree, the said weekly payments to be valid liens on the defendant's real estate; that the defendant give bond to the plaintiff in the sum of $10,000 to secure the payment of the sums of money directed to be paid; and to pay costs, taxed at $136.07, and a counsel fee of $1000; and that on his default to pay any of the "foregoing sums of money" or to give bond, application might be made for the issue of a writ of sequestration against him, or for an order appointing a receiver of his property, and enjoining his transfer thereof. The record showed the following material facts:

On November 18, 1892, the plaintiff in this action filed her bill for a divorce in the Court of Chancery of New Jersey, setting forth her marriage with the present defendant on March 25, 1884, in New Jersey, where she has since resided; and praying for a divorce from the bond of matrimony for desertion for two years, and for reasonable alimony. The defendant was not served with process other than by publication, and did not appear or answer the bill. On August 7, 1893, a decree of divorce was entered, not mentioning alimony.

On February 10, 1896, the plaintiff, alleging that this decree was incomplete through the neglect of her counsel, filed a petition in that court, praying for an opening and amendment of the decree by allowing reasonable alimony. Upon this petition, a rule to show cause was entered, and it was ordered that copies of the petition and affidavits accompanying it be served on the defendant.

In answer to the rule, the defendant appeared generally, and filed an affidavit, declaring that he was a resident of New York, "that this defendant

was by the decree of this court divorced from said petitioner" on August 7, 1893, "and since that time has been married again to another woman," "that the decree for divorce in said cause was purposely drawn without providing for or reserving any alimony;" and "that he is financially unable to pay alimony."

On October 26, 1896, the Court of Chancery of New Jersey amended the decree of August 7, 1893, by ordering that the petitioner "have the right to apply to this court at any time hereafter, at the foot of this decree, for reasonable alimony, and for such other relief in the premises touching alimony as may be equitable and just; and this court reserves the power to make such order or decree as may be necessary to allow and compel the payment of alimony to the petitioner by defendant, or to refuse to allow alimony." 9 Dickinson (54 N. J. Eq.) 473. On appeal this order was affirmed by the New Jersey Court of Errors and Appeals. 10 Dickinson (55 N. J. Eq.) 591. Thereupon an order of reference, based on all prior proceedings, and on notice to the solicitor for the defendant, was made by the Court of Chancery to a master to find the amount of alimony, if any, due to the plaintiff. Neither the defendant nor his solicitor appeared at the hearing before the master; and on December 28, 1897, the Court of Chancery, confirming the master's report, made the decree now sued on.

That court, on its being made to appear that a certified copy of this decree was personally served on the defendant, and that he refused to comply with said decree, ordered that a receiver be appointed to take possession of all the defendant's real and personal property in New Jersey to apply it to the payment of the plaintiff's claim. The receiver, however, was "unable to obtain possession of any property or assets of said defendant in the State of New Jersey;" nor had the defendant "complied with said decree in any respect."

The Supreme Court of New York decreed that the plaintiff was "entitled to a judgment against the defendant, enforcing against said defendant the decree of the Court of Chancery of New Jersey, dated December 28, 1897," and the order appointing a receiver, and enjoining the defendant from transferring his property; also that the plaintiff was entitled to judgment that the defendant pay her $8976.07, "being alimony, counsel fee and costs, due under said decree," and interest thereon from its date; also the "sum $4400, being the amount of weekly alimony which has accrued since said decree in accordance with the terms thereof," and interest thereon; also $80 a week from the date of this decision "as and for permanent alimony," bearing interest until paid; that he give bond "in the sum of $100,000 to secure payment of the several sums of money aforesaid;" and that, if the defendant fail to comply with this decision, "a receiver be appointed, ancillary to the receiver heretofore appointed by the Court of Chancery of New Jersey as aforesaid, of the real and personal property of the defendant within the State of New York."

On appeal by the defendant to the Appellate Division, the decree was modified so as to allow the plaintiff to recover only $8840 alimony, the amount declared by the New Jersey court as due and payable at the date of its decree. Thus modified, the judgment of the Supreme Court was affirmed. 41 N. Y. App. Div. 280.

From the judgment of the Appellate Division both parties appealed to the Court of Appeals, which affirmed the judgment of the Appellate Division. 162 N. Y. 405. Each party sued out a writ of error from this court.

[April 15, 1901.]

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the Court.

The husband, as the record shows, having appeared generally in answer to the petition for alimony in the Court of Chancery in New Jersey, the decree of that court for alimony was binding upon him. *Laing* v. *Rigney*, 160 U. S. 531. The court of New York having so ruled, thereby deciding in favor of the full faith and credit claimed for that decree under the Constitution and laws of the United States, its judgment on that question cannot be reviewed by this court on writ of error. *Gordon* v. *Caldcleugh*, 3 Cranch, 268; *Missouri* v. *Andriano*, 138 U. S. 496. The husband having appeared and been heard in the proceeding for alimony, there is no color for his present contention that he was deprived of his property without due process of law. Nor does he appear to have made any such contention in the courts of the State. His writ of error, therefore, must be dismissed.

By the Constitution and the act of Congress, requiring the faith and credit to be given to a judgment of the court of another State that it has in the State where it was rendered, it was long ago declared by this court: "The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit." *McElmoyle* v. *Cohen*, 13 Pet. 312, 325; *Thompson* v. *Whitman*, 18 Wall. 457, 463; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292; *Bullock* v. *Bullock*, 6 Dickinson (51 N. J. Eq.) 444, and 7 Dickinson (52 N. J. Eq.) 561.

The decree of the Court of Chancery of New Jersey, on which this suit is brought, provides, first, for the payment of $7840 for alimony already due, and $1000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of $80 per week; and third, for the giving of a bond to secure the payment of these sums, and, on default of payment or of giving

bond, for leave to apply for a writ of sequestration, or a receiver and injunction.

The decree for the payment of $8840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver and injunction, being in the nature of execution, and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended on the local statutes and practice of the State, and involved no Federal question.

On the writ of error of the wife, therefore,

The judgment is affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.